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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1966

JUNE 12, 1967
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ABE FORTAS, Associate Justice.

RETIRED.

STANLEY REED, Associate Justice.

RAMSEY CLARK, Attorney General.
THURGOOD MARSHALL, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

381893

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 11, 1965.

(For next previous allotment, see 371 U. S., p. v.)

RETIREMENT OF MR. JUSTICE CLARK.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 12, 1967.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

THE CHIEF JUSTICE said:

This being the final session of the 1966 Term which represents 18 years of service on the Court by MR. JUSTICE CLARK, and because this is his last session with us, the Court believes that we should not adjourn without taking note of his departure.

Under ordinary circumstances, I would say that we approach his retirement with great regret, but realizing the happy circumstances which bring about his retirement I can only say that we view his departure with mixed feelings.

JUSTICE CLARK has had a great public career. He graduated from the Law School of the University of Texas in his native State in 1922, and practiced law, both publicly and privately, for 15 years, until he entered the Department of Justice as a Special Assistant in 1937. He rose rapidly in the ranks of the Department, and scaled the entire echelon until he finally became Attorney General of the United States in 1945. Having served with distinction, he was appointed to the Supreme Court by President Truman in 1949. For 18 years he has served with distinction on this Court. During those dynamic years he wrote many of the most important opinions of the times.

He has been a great companion for us, and he departs with the affection of every member of the Court. We are happy to know that he leaves in the best of health and for a happy reason. We have no idea what he will undertake to do in the future, but we know that he will be active, and that he will continue throughout his useful years, which we hope will be many, to devote his efforts to the improvement of the administration of justice.

MR. JUSTICE CLARK said:

MR. CHIEF JUSTICE and my Brother Associate Justices:

You have been most generous in your statement, MR. CHIEF JUSTICE, for which I am deeply grateful. If my Father were here he would chuckle—perhaps laugh—at hearing such a eulogy; but if my Mother were here, she would believe every word of it, and love it!

My eighteen years' service on the Court has been the most rewarding of my public life. To two great Presidents I am grateful for giving me this opportunity. First, to Franklin Delano Roosevelt for bringing me into the Department of Justice in 1937 and appointing me Assistant Attorney General in 1943; and, the more am I indebted to the best client of my life, President Harry S Truman, for whom I served as Attorney General of the United States.

And let me also thank all my present colleagues on the bench for their most helpful and cooperative assistance; and also those who are gone but with whom I was privileged to have served, one of whom, Justice Reed, I see in the courtroom today. And, to my law clerks—all 36 and many of whom are here today—I am appreciative of their diligent, effective, and devoted service; and to my loyal secretary of almost a quarter of a century, Miss Alice O'Donnell, I give my grateful thanks. If I have accomplished any of the things which you enumerated, MR. CHIEF JUSTICE, it has been due to

Mary, my dear wife, whose love and devotion have been my inspiration.

Today our emotions are mixed—happiness with regrets. But it is not the last day of which I speak, it is rather the first day of the new life which we shall continue to dedicate to the public interest. As we enter it—and close our 18 years here—we call to mind the words of the Court Crier: "God bless the United States and this Honorable Court."

TRIBUTE TO MR. JUSTICE BLACK.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 12, 1967.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

THE CHIEF JUSTICE said:

Also, because this is the last session of our 1966 Term, we should tarry long enough to take notice of another significance the day has for us. It represents the completion of thirty years of service on this Court by MR. JUSTICE BLACK. Only eight other Justices in the long history of the Court have achieved such a record and none in a more dynamic period or with greater distinction. In this long period, he has written hundreds of important opinions that in the aggregate constitute a monumental part of the jurisprudence of the Court.

As he passes this milestone, we all wish for him continued good health and happiness.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1966.

LOVING ET UX. *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 395. Argued April 10, 1967.—Decided June 12, 1967.

Virginia's statutory scheme to prevent marriages between persons solely on the basis of racial classifications *held* to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pp. 4–12.

206 Va. 924, 147 S. E. 2d 78, reversed.

Bernard S. Cohen and *Philip J. Hirschkop* argued the cause and filed a brief for appellants. *Mr. Hirschkop* argued *pro hac vice,* by special leave of Court.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were *Robert Y. Button,* Attorney General, and *Kenneth C. Patty,* Assistant Attorney General.

William M. Marutani, by special leave of Court, argued the cause for the Japanese American Citizens League, as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging reversal, were filed by *William M. Lewers* and *William B. Ball* for the National Catholic Conference for Interracial Justice et al.;

by *Robert L. Carter* and *Andrew D. Weinberger* for the National Association for the Advancement of Colored People, and by *Jack Greenberg, James M. Nabrit III* and *Michael Meltsner* for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.

T. W. Bruton, Attorney General, and *Ralph Moody,* Deputy Attorney General, filed a brief for the State of North Carolina, as *amicus curiae,* urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[1] For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court

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[1] Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after

modifying the sentence, affirmed the convictions.[2] The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U. S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20–58 of the Virginia Code:

> "*Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20–59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 20–59, which defines the penalty for miscegenation, provides:

> "*Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

Other central provisions in the Virginia statutory scheme are § 20–57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding,[3] and §§ 20–54 and 1–14 which,

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[2] 206 Va. 924, 147 S. E. 2d 78 (1966).

[3] Section 20–57 of the Virginia Code provides:

"*Marriages void without decree.*—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Va. Code Ann. § 20–57 (1960 Repl. Vol.).

respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions.[4] The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

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[4] Section 20–54 of the Virginia Code provides:

"*Intermarriage prohibited; meaning of term 'white persons.'*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter." Va. Code Ann. § 20–54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas . . . ." Plecker, The New Family and Race Improvement, 17 Va. Health Bull., Extra No. 12, at 25–26 (New Family Series No. 5, 1925), cited in Wadlington, The *Loving* Case: Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1–14 of the Virginia Code provides:

"*Colored persons and Indians defined.*—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians." Va. Code Ann. § 1–14 (1960 Repl. Vol.).

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.[5] Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.[6] The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," [7] a prohibition against issuing marriage licenses until the issuing official is satisfied that

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[5] After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, Ala. Const., Art. 4, § 102, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55–104 (1947); Delaware, Del. Code Ann., Tit. 13, § 101 (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53–106 (1961); Kentucky, Ky. Rev. Stat. Ann. § 402.020 (Supp. 1966); Louisiana, La. Rev. Stat. § 14:79 (1950); Mississippi, Miss. Const., Art. 14, § 263, Miss. Code Ann. § 459 (1956); Missouri, Mo. Rev. Stat. § 451.020 (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, N. C. Gen. Stat. § 14–181 (1953); Oklahoma, Okla. Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, S. C. Const., Art. 3, § 33, S. C. Code Ann. § 20–7 (1962); Tennessee, Tenn. Const., Art. 11, § 14, Tenn. Code Ann. § 36–402 (1955); Texas, Tex. Pen. Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. *Perez* v. *Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

[6] For a historical discussion of Virginia's miscegenation statutes, see Wadlington, *supra*, n. 4.

[7] Va. Code Ann. § 20–54 (1960 Repl. Vol.).

the applicants' statements as to their race are correct,[8] certificates of "racial composition" to be kept by both local and state registrars,[9] and the carrying forward of earlier prohibitions against racial intermarriage.[10]

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.*, at 90, 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard* v. *Hill*, 125 U. S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element

[8] Va. Code Ann. § 20–53 (1960 Repl. Vol.).
[9] Va. Code Ann. § 20–50 (1960 Repl. Vol.).
[10] Va. Code Ann. § 20–54 (1960 Repl. Vol.).

as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, *Allied Stores of Ohio,*

Inc. v. *Bowers*, 358 U. S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." *Brown* v. *Board of Education*, 347 U. S. 483, 489 (1954). See also *Strauder*

v. *West Virginia*, 100 U. S. 303, 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin* v. *Florida*, 379 U. S. 184 (1964).

The State finds support for its "equal application" theory in the decision of the Court in *Pace* v. *Alabama*, 106 U. S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin* v. *Florida*, *supra*, at 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases*, 16 Wall. 36, 71 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880); *Ex parte Virginia*, 100 U. S. 339, 344–345 (1880); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin* v. *Florida, supra,* at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.[11] We have consistently denied

[11] Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry with-

the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942). See also *Maynard* v. *Hill*, 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. *It is so ordered.*

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out statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.

1 STEWART, J., concurring.

MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin* v. *Florida*, 379 U. S. 184, 198 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

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WASHINGTON *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 649. Argued March 15–16, 1967.—Decided June 12, 1967.

Petitioner and another were charged with a fatal shooting. Petitioner's alleged coparticipant was tried first and convicted of murder. At petitioner's trial for the same murder he sought to secure his coparticipant's testimony which would have been vital for his defense. On the basis of two Texas statutes which at the time of trial prevented a participant accused of a crime from testifying for his coparticipant (but not for the prosecution), the judge sustained the State's objection to the coparticipant's testimony. Petitioner's conviction ensued and was upheld on appeal. *Held:*

1. The right under the Sixth Amendment of a defendant in a criminal case to have compulsory process for obtaining witnesses in his favor applies to the States through the Fourteenth Amendment. Pp. 17–19.

2. The State arbitrarily denied petitioner the right to have the material testimony for him of a witness concerning events which that witness observed and thus denied him the right to have compulsory process for obtaining witnesses in his favor. Pp. 19–23.

400 S. W. 2d 756, reversed.

Charles W. Tessmer argued the cause for petitioner. With him on the brief was *Emmett Colvin, Jr.*

Howard M. Fender, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Crawford C. Martin,* Attorney General, *George Cowden,* First Assistant Attorney General, *Robert Lattimore,* Assistant Attorney General, and *A. J. Carubbi, Jr.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

We granted certiorari in this case to determine whether the right of a defendant in a criminal case under the

Sixth Amendment[1] to have compulsory process for obtaining witnesses in his favor is applicable to the States through the Fourteenth Amendment,[2] and whether that right was violated by a state procedural statute providing that persons charged as principals, accomplices, or accessories in the same crime cannot be introduced as witnesses for each other.

Petitioner, Jackie Washington, was convicted in Dallas County, Texas, of murder with malice and was sentenced by a jury to 50 years in prison. The prosecution's evidence showed that petitioner, an 18-year-old youth, had dated a girl named Jean Carter until her mother had forbidden her to see him. The girl thereafter began dating another boy, the deceased. Evidently motivated by jealousy, petitioner with several other boys began driving around the City of Dallas on the night of August 29, 1964, looking for a gun. The search eventually led to one Charles Fuller, who joined the group with his shotgun. After obtaining some shells from another source, the group of boys proceeded to Jean Carter's home, where Jean, her family and the deceased were having supper. Some of the boys threw bricks at the house and then ran back to the car, leaving petitioner and Fuller alone in front of the house with the shotgun. At the sound of the bricks the deceased and Jean Carter's mother rushed out on the porch to investigate. The shotgun was fired by either petitioner or Fuller, and the

[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[2] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

deceased was fatally wounded. Shortly afterward petitioner and Fuller came running back to the car where the other boys waited, with Fuller carrying the shotgun.

Petitioner testified in his own behalf. He claimed that Fuller, who was intoxicated, had taken the gun from him, and that he had unsuccessfully tried to persuade Fuller to leave before the shooting. Fuller had insisted that he was going to shoot someone, and petitioner had run back to the automobile. He saw the girl's mother come out of the door as he began running, and he subsequently heard the shot. At the time, he had thought that Fuller had shot the woman. In support of his version of the facts, petitioner offered the testimony of Fuller. The record indicates that Fuller would have testified that petitioner pulled at him and tried to persuade him to leave, and that petitioner ran before Fuller fired the fatal shot.

It is undisputed that Fuller's testimony would have been relevant and material, and that it was vital to the defense. Fuller was the only person other than petitioner who knew exactly who had fired the shotgun and whether petitioner had at the last minute attempted to prevent the shooting. Fuller, however, had been previously convicted of the same murder and sentenced to 50 years in prison,[3] and he was confined in the Dallas County jail. Two Texas statutes provided at the time of the trial in this case that persons charged or convicted as coparticipants in the same crime could not testify for one another,[4] although there was no bar to their testi-

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[3] See *Fuller* v. *State*, 397 S. W. 2d 434 (Tex. Crim. App. 1966).

[4] "Persons charged as principals, accomplices or accessories, whether in the same or by different indictments, can not be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others." Tex. Pen. Code, Art. 82.

"Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as wit-

fying for the State.[5] On the basis of these statutes the trial judge sustained the State's objection and refused to allow Fuller to testify. Petitioner's conviction followed, and it was upheld on appeal by the Texas Court of Criminal Appeals. 400 S. W. 2d 756. We granted certiorari. 385 U. S. 812. We reverse.

I.

We have not previously been called upon to decide whether the right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the

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nesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others." Tex. Code Crim. Proc., Art. 711 (1925).

These statutory provisions were apparently repealed by implication by Art. 36.09 of the Texas Code of Criminal Procedure of 1965, which became effective after petitioner's trial. Article 36.09 provides that "Two or more defendants who are jointly or separately indicted or complained against for the same offense or an offense growing out of the same transaction may be, in the discretion of the court, tried jointly or separately as to one or more defendants; provided that in any event either defendant may testify for the other or on behalf of the State . . . ."

Counsel have cited no statutes from other jurisdictions, and we have found none, that flatly disqualify coparticipants in a crime from testifying for each other regardless of whether they are tried jointly or separately. To be distinguished are statutes providing that one of two or more defendants tried jointly may, if the evidence against him is insufficient, be entitled to an immediate acquittal so he may testify for the others. These statutes seem designed to allow such joint defendants to testify without incriminating themselves. See, *e. g.*, Ala. Code, Tit. 15, § 309 (1958); Alaska Code Crim. Proc. § 12.20.060 (1962); Kan. Gen. Stat. Ann. § 62–1440 (1964).

[5] *Rangel* v. *State*, 22 Tex. Ct. App. 642, 3 S. W. 788 (1887).

Due Process Clause of the Fourteenth Amendment.[6] At one time, it was thought that the Sixth Amendment had no application to state criminal trials.[7] That view no longer prevails, and in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law. We have held that due process requires that the accused have the assistance of counsel for his defense,[8] that he be confronted with the witnesses against him,[9] and that he have the right to a speedy[10] and public[11] trial.

The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in *In re Oliver*, 333 U. S. 257 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U. S., at 273 (footnote omitted).

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[6] "[A] provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963).

[7] See *West* v. *Louisiana*, 194 U. S. 258, 264 (1904).

[8] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

[9] *Pointer* v. *Texas*, 380 U. S. 400 (1965).

[10] *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967).

[11] *In re Oliver*, 333 U. S. 257 (1948).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

II.

Since the right to compulsory process is applicable in this state proceeding, the question remains whether it was violated in the circumstances of this case. The testimony of Charles Fuller was denied to the defense not because the State refused to compel his attendance, but because a state statute made his testimony inadmissible whether he was present in the courtroom or not. We are thus called upon to decide whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witnesses on the stand, as well as the right to compel their attendance in court. The resolution of this question requires some discussion of the common-law context in which the Sixth Amendment was adopted.

Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all.[12] Although

[12] 3 Story, Commentaries on the Constitution of the United States §§ 1786–1788 (1st ed. 1833).

the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787,[13] the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

Despite the abolition of the rule generally disqualifying defense witnesses, the common law retained a number of restrictions on witnesses who were physically and mentally capable of testifying. To the extent that they were applicable, they had the same effect of suppressing the truth that the general proscription had had. Defendants and codefendants were among the large class of witnesses disqualified from testifying on the ground of interest.[14] A party to a civil or criminal case was not allowed to testify on his own behalf for fear that he might be tempted to lie. Although originally the disqualification of a codefendant appears to have been based only on his status as a party to the action, and in some jurisdictions co-indictees were allowed to testify for or against each other if granted separate trials,[15] other jurisdictions came to the view that accomplices or co-indictees were incompetent to testify at least in favor of each other even at separate trials, and in spite of statutes making a defendant competent to testify in his own be-

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[13] By 1701 the accused in both treason and felony cases was allowed to produce witnesses who could testify under oath. See 2 Wigmore, Evidence § 575, at 685–686 (3d ed. 1940).

[14] See generally 2 Wigmore §§ 575–576 (3d ed. 1940). We have discussed elsewhere the gradual demise of the common-law rule prohibiting defendants from testifying in their own behalf. See *Ferguson* v. *Georgia*, 365 U. S. 570 (1961).

[15] See 2 Wigmore § 580, at 709–710 (3d ed. 1940); *Henderson* v. *State*, 70 Ala. 23, 24–25 (Dec. Term 1881); *Allen* v. *State*, 10 Ohio St. 287, 303 (Dec. Term 1859).

half.[16] It was thought that if two persons charged with the same crime were allowed to testify on behalf of each other, "each would try to swear the other out of the charge." [17] This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue.[18]

The federal courts followed the common-law restrictions for a time, despite the Sixth Amendment. In *United States* v. *Reid*, 12 How. 361 (1852), the question was whether one of two defendants jointly indicted for murder on the high seas could call the other as a witness. Although this Court expressly recognized that the Sixth Amendment was designed to abolish some of the harsh rules of the common law, particularly including the refusal to allow the defendant in a serious criminal case to present witnesses in his defense,[19] it held that the rules of evidence in the federal courts were those in force in the various States at the time of the passage of the Judiciary Act of 1789, including the disqualification of defendants indicted together. The holding in *United States* v. *Reid* was not satisfactory to later generations, however, and in 1918 this Court expressly overruled it,

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[16] See *Foster* v. *State*, 45 Ark. 328 (May Term 1885); *State* v. *Drake*, 11 Ore. 396, 4 Pac. 1204 (1884). Both cases have been overturned by statute. Ark. Stat. Ann. § 43–2017 (1947); Ore. Rev. Stat. § 139.315 (1965).

[17] *Benson* v. *United States*, 146 U. S. 325, 335 (1892).

[18] "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors." *Benson* v. *United States*, 146 U. S. 325, 336 (1892).

[19] 12 How., at 363–364.

refusing to be bound by "the dead hand of the common-law rule of 1789," and taking note of "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . ." *Rosen* v. *United States*, 245 U. S. 467, 471.

Although *Rosen* v. *United States* rested on nonconstitutional grounds, we believe that its reasoning was required by the Sixth Amendment. In light of the common-law history, and in view of the recognition in the *Reid* case that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant.[20] Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecu-

[20] See n. 5, *supra*.

tion for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large. Moreover, under the Texas statutes the accused accomplice is no longer disqualified if he is acquitted at his own trial. Presumably, he would then be free to testify on behalf of his comrade, secure in the knowledge that he could incriminate himself as freely as he liked in his testimony, since he could not again be prosecuted for the same offense. The Texas law leaves him free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie.

We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.[21] The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed.

It is so ordered.

MR. JUSTICE HARLAN, concurring in the result.

For reasons that I have stated in my concurring opinion in *Gideon* v. *Wainwright*, 372 U. S. 335, 349, and in my opinion concurring in the result in *Pointer* v. *Texas*,

[21] Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them.

380 U. S. 400, 408, and in my dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497, 539–545, I cannot accept the view that the Due Process Clause of the Fourteenth Amendment "incorporates," in its terms, the specific provisions of the Bill of Rights. In my view the Due Process Clause is not reducible to "a series of isolated points," but is rather "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Poe* v. *Ullman*, *supra*, at 543; see *Palko* v. *Connecticut*, 302 U. S. 319; *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (opinion concurring in the result).

I concur in the result in this case because I believe that the State may not constitutionally forbid the petitioner, a criminal defendant, from introducing on his own behalf the important testimony of one indicted in connection with the same offense, who would not, however, be barred from testifying if called by the prosecution. Texas has put forward no justification for this type of discrimination between the prosecution and the defense in the ability to call the same person as a witness, and I can think of none.

In my opinion this is not, then, really a problem of "compulsory process" at all, although the Court's incorporationist approach leads it to strain this constitutional provision to reach these peculiar statutes. Neither is it a situation in which the State has determined, as a matter of valid state evidentiary law, on the basis of general experience with a particular class of persons, as for example, the mentally incompetent [1] or those previously convicted of perjury,[2] that the pursuit of

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[1] *E. g.*, Cal. Civ. Proc. Code § 1880, subd. 1; Cal. Pen. Code § 1321.

[2] *E. g.*, Vermont Stat. Ann., Tit. 12, § 1608. See generally 2 Wigmore, Evidence § 488 (3d ed. 1940).

truth is best served by an across-the-board disqualification as witnesses of persons of that class. Compare *Spencer* v. *Texas*, 385 U. S. 554. This is rather a case in which the State has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by the defendant. This, I think, the Due Process Clause forbids.

On this premise I concur in the reversal of the judgment of conviction.

NATIONAL LABOR RELATIONS BOARD *v.* GREAT DANE TRAILERS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 781. Argued April 19, 1967.—Decided June 12, 1967.

Respondent company and a union representing its employees entered into a collective bargaining agreement which contained a provision for employee vacation benefits, to be paid on the Friday nearest July 1 of each year. Most of the employees went on strike May 16, 1963, and many were gradually replaced by respondent. A demand for vacation pay by the strikers on July 12, 1963, was rejected by the company on the ground that the strike had terminated all contractual obligations. Thereafter the company announced that it would grant vacation pay, according to the terms specified in the old agreement, to all employees who had reported for work on July 1, 1963. The National Labor Relations Board (NLRB) held that respondent had violated §§ 8 (a)(3) and (1) of the National Labor Relations Act by its actions in regard to vacation benefits, and ordered payment of such benefits to the strikers. The Court of Appeals held that the dispute concerned a "term or condition of employment," that the Board had properly exercised its jurisdiction, but that although discrimination between striking and nonstriking employees was proved, the Board's unfair labor practice conclusion was not well-founded since there was no affirmative showing of an unlawful motivation to discourage union membership or to interfere with protected rights. Despite the fact that respondent had not introduced evidence of legitimate business purpose underlying its discriminatory action, the Court of Appeals speculated upon several motives, the possibility of which it felt was sufficient to overcome the inference of improper motive which flowed from the conduct itself, and it denied enforcement of the NLRB's order. *Held:*

1. While there is little question that the refusal to pay vacation benefits to strikers was discrimination, and that such discrimination had a potential for discouraging union membership and activity, § 8 (a)(3) normally requires proof that the discriminatory conduct was motivated by an antiunion purpose. *American Ship Building Co.* v. *Labor Board,* 380 U. S. 300. Pp. 32–34.

2. If it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed, and the Board can find an unfair labor practice despite employer evidence of business justifications; but if the adverse effect of the discrimination on employee rights is "comparatively slight," an antiunion motivation must be proved *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. P. 34.

3. Since discriminatory conduct carrying a potential for adverse effect on employee rights was proved and no evidence of a proper motivation was shown, the Board's conclusions were supported by substantial evidence, and the Court of Appeals should not have speculated upon respondent's motives but should instead have enforced the NLRB's order. Pp. 34–35.

363 F. 2d 130, reversed and remanded.

Arnold Ordman argued the cause for petitioner. With him on the brief were *Solicitor General Marshall, Dominick L. Manoli* and *Norton J. Come.*

O. R. T. Bowden argued the cause and filed a brief for respondent.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The issue here is whether, in the absence of proof of an antiunion motivation, an employer may be held to have violated §§ 8 (a)(3) and (1) of the National Labor Relations Act [1] when it refused to pay striking employees vacation benefits accrued under a terminated collective bargaining agreement while it announced an intention to pay such benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a certain date during the strike.

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[1] National Labor Relations Act, as amended, §§ 8 (a)(3) and (1), 61 Stat. 140–141, 29 U. S. C. §§ 158 (a)(3) and (1).

The respondent company and the union [2] entered into a collective bargaining agreement which was effective by its terms until March 31, 1963. The agreement contained a commitment by the company to pay vacation benefits to employees who met certain enumerated qualifications.[3] In essence, the company agreed to pay specified vacation

[2] Local 26, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

[3] Article VIII of the collective bargaining agreement was entitled "Vacations." It read, in pertinent part:

"(a) Each qualified employee covered by this agreement shall be entitled after one (1) year of continuous employment, at a time agreeable to the Company, to a vacation of seven (7) consecutive days with pay for forty (40) hours at the rate of pay existing for such employee at the time of the beginning of his vacation. Each employee, after five (5) years' continuous service, shall be entitled to a vacation of fourteen (14) consecutive days, with pay for eighty (80) hours. Any employee entitled to a vacation with pay may waive the right, if his services are needed by the employer, to such vacation during the period of this agreement, and in such cases shall be entitled to receive in lieu thereof, at the time he becomes entitled to the vacation, the amount of vacation pay such employee would otherwise have received over and above the wages received for work performed during the vacation period.

"(b) To qualify for the said vacation, it is necessary that an employee shall have worked a total of fifteen hundred twenty-five (1525) hours in the said year; any time lost, however, because of an industrial accident while employed by this Company to count as part of the qualifying time.

. . . . .

"(d) Employees who have served less than sixty (60) days on the next July 1 after date of employment will receive no vacation pay on that date but on the following July 1 will receive the vacation due in accordance with the above qualifying requirements, plus extra amount due in accordance with hours worked.

"(e) In case of lay-off, termination or quitting, an employee who has served more than sixty (60) days shall receive pro rata share of vacation.

"(f) All vacation pay shall be paid on Friday nearest July 1st, except as outlined in paragraph (d)."

benefits to employees who, during the preceding year, had worked at least 1,525 hours. It was also provided that, in the case of a "lay-off, termination or quitting," employees who had served more than 60 days during the year would be entitled to pro rata shares of their vacation benefits. Benefits were to be paid on the Friday nearest July 1 of each year.

The agreement was temporarily extended beyond its termination date, but on April 30, 1963, the union gave the required 15 days' notice of intention to strike over issues which remained unsettled at the bargaining table. Accordingly, on May 16, 1963, approximately 350 of the company's 400 employees commenced a strike which lasted until December 26, 1963. The company continued to operate during the strike, using nonstrikers, persons hired as replacements for strikers, and some original strikers who had later abandoned the strike and returned to work.[4] On July 12, 1963, a number of the strikers demanded their accrued vacation pay from the company. The company rejected this demand, basing its response on the assertion that all contractual obligations had been terminated by the strike and, therefore, none of the company's employees had a right to vacation pay. Shortly thereafter, however, the company announced that it would grant vacation pay—in the amounts and subject to the conditions set out in the expired agreement—to all employees who had reported for work on July 1, 1963. The company denied that these payments were founded on the agreement and stated that they merely reflected a new "policy" which had been unilaterally adopted.

[4] All strikers had been replaced by October 8, 1963. After their replacement, some strikers were rehired by the company, apparently as new employees.

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The refusal to pay vacation benefits to strikers, coupled with the payments to nonstrikers, formed the bases of an unfair labor practice complaint filed with the Board while the strike was still in progress. Violations of §§ 8 (a)(3) and (1) were charged. A hearing was held before a trial examiner who found that the company's action in regard to vacation pay constituted a discrimination in terms and conditions of employment which would discourage union membership, as well as an unlawful interference with protected activity. He held that the company had violated §§ 8 (a)(3) and (1) and recommended that it be ordered to cease and desist from its unfair labor practice and to pay the accrued vacation benefits to strikers. The Board, after reviewing the record, adopted the Trial Examiner's conclusions and remedy.[5]

A petition for enforcement of the order was filed in the Court of Appeals for the Fifth Circuit. That court first dealt with the company's contention that the Board had lacked jurisdiction and that the union should have been relegated either to the bargaining table or to a lawsuit under § 301 of the Act,[6] since the basic question was one of contract interpretation and application. It noted that the company's announced policy relating to vacation pay clearly concerned a "term or condition of employment"; since it was alleged that the company had discriminated between striking and nonstriking employees in regard to that term or condition of employment, the complaint stated "an unfair labor practice charge in simplest terms" and the Board had properly exercised its jurisdiction.[7]

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[5] The complaint also charged independent violations of § 8 (a)(1). These were rejected by the Trial Examiner and by the Board.

[6] § 301, Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185.

[7] In this Court the company apparently abandoned the argument under § 301. In any event, we agree with the Court of Appeals

Reviewing the substantive aspects of the Board's decision next, the Court of Appeals held that, although discrimination between striking and nonstriking employees had been proved, the Board's conclusion that the company had committed an unfair labor practice was not well-founded inasmuch as there had been no affirmative showing of an unlawful motivation to discourage union membership or to interfere with the exercise of protected rights. Despite the fact that the company itself had not introduced evidence of a legitimate business purpose underlying its discriminatory action, the Court of Appeals speculated that it might have been motivated by a desire "(1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods." Believing that the possibility of the existence of such motives was sufficient to overcome the inference of an improper motive which flowed from the conduct itself, the court denied enforcement of the order. 363 F. 2d 130 (1966). We granted certiorari to determine whether the treatment of the motivation issue by the Court of Appeals was consistent with recent decisions of this Court. 385 U. S. 1000 (1967).

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that the complaint, alleging as it did a discrimination in regard to a term or condition of employment, stated an unfair labor practice charge. The fact that the conduct complained of might also have supported an action under § 301 did not deprive the Board of jurisdiction. *NLRB* v. *C & C Plywood Corp.*, 385 U. S. 421 (1967); *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270 (1956). Cf. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). This, of course, is not to say that every breach of a collective bargaining agreement may be the subject of an unfair labor practice proceeding. But when the elements of an unfair labor practice are present in a breach of contract, the injured party is not automatically deprived by § 301 of his right to proceed before the Board where his remedy may be speedier and less expensive than a lawsuit. *NLRB* v. *C & C Plywood Corp.*, *supra*, at 429–430.

The unfair labor practice charged here is grounded primarily in § 8 (a)(3) which requires specifically that the Board find a discrimination and a resulting discouragement of union membership. *American Ship Building Co.* v. *Labor Board,* 380 U. S. 300, 311 (1965). There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form. Compare *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793 (1945), with *Teamsters Union* v. *Labor Board,* 365 U. S. 667 (1961). Some employees who met the conditions specified in the expired collective bargaining agreement were paid accrued vacation benefits in the amounts set forth in that agreement, while other employees [8] who also met the conditions but who had engaged in protected concerted activity were denied such benefits. Similarly, there can be no doubt but that the discrimination was capable of discouraging membership in a labor organization within the meaning of the statute. Discouraging membership in a labor organization "includes discouraging participation in concerted activities . . . such as a legitimate strike." *Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221, 233 (1963). The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity.

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[8] National Labor Relations Act, as amended, § 2 (3), 61 Stat. 137, 29 U. S. C. § 152 (3), declares:

"The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment . . . ."

But inquiry under § 8 (a)(3) does not usually stop at this point. The statutory language "discrimination . . . to . . . discourage" means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose. *American Ship Building Co.* v. *Labor Board,* 380 U. S. 300 (1965). It was upon the motivation element that the Court of Appeals based its decision not to grant enforcement, and it is to that element which we now turn. In three recent opinions we considered employer motivation in the context of asserted § 8 (a)(3) violations. *American Ship Building Co.* v. *Labor Board, supra; Labor Board* v. *Brown,* 380 U. S. 278 (1965); and *Labor Board* v. *Erie Resistor Corp., supra.* We noted in *Erie Resistor, supra,* at 227, that proof of an antiunion motivation may make unlawful certain employer conduct which would in other circumstances be lawful. Some conduct, however, is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. *Labor Board* v. *Brown, supra,* at 287; *American Ship Building Co.* v. *Labor Board, supra,* at 311. That is, some conduct carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent." *Labor Board* v. *Erie Resistor Corp., supra,* at 228, 231. If the conduct in question falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails, "an unfair labor practice charge is made out." *Id.,* at 228. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted

business justifications and the invasion of employee rights in light of the Act and its policy. *Id.*, at 229. On the other hand, when "the resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful," and an affirmative showing of improper motivation must be made. *Labor Board* v. *Brown, supra,* at 289; *American Ship Building Co.* v. *Labor Board, supra,* at 311–313.

From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Applying the principles to this case then, it is not necessary for us to decide the degree to which the challenged conduct might have affected employee rights. As the Court of Appeals correctly noted, the company came forward with no evidence of legitimate motives for its discriminatory conduct. 363 F. 2d, at 134. The company simply did not meet the burden of proof, and

the Court of Appeals misconstrued the function of judicial review when it proceeded nonetheless to speculate upon what *might have* motivated the company. Since discriminatory conduct carrying a potential for adverse effect upon employee rights was proved and no evidence of a proper motivation appeared in the record, the Board's conclusions were supported by substantial evidence, *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474 (1951), and should have been sustained.

The judgment of the Court of Appeals is reversed and the case is remanded with directions to enforce the Board's order.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Because I think that the Court puts forth a premise which misinterprets the recent decision in *NLRB* v. *C & C Plywood Corp.*, 385 U. S. 421, and has proposed a determining rule based on a distillation of prior opinions which is, in my view, substantially inaccurate, I am constrained to express my dissent from its opinion. I believe that the Fifth Circuit correctly analyzed the problem, and that its decision should be affirmed.

The Court begins by stating that vacation benefits had "accrued" under the contract, and implies that striking employees had a contractual right to such benefits which was arbitrarily disregarded by Great Dane in order to punish those employees for engaging in protected activity. Were these the properly established facts of the case, I would have little difficulty in concurring in the result reached by the majority. Employer action which undercuts rights protected by § 7 of the National Labor Relations Act, as amended, 61 Stat. 140, and has no inferable, legitimate business purpose has been held a violation of §§ 8 (a)(3) and (1). *Republic Aviation*

Corp. v. *Labor Board,* 324 U. S. 793. But the contract dispute is not so frivolous as to be determined without examination,[1] and the issue framed by the Court is not properly before us. Moreover, contrary to the Court's assertion, neither the Board nor the lower court limited itself to considering this issue, and both recognized a limitation on the Board's contract interpretation powers in light of § 301 (a) of the Labor Management Relations Act, 1947.[2]

The Board disclaimed "interpreting the contract for the parties" and held only that "strikers must be treated uniformly with nonstrikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship." It explained that its order would merely force the employer to use the same vacation pay criteria for all employees and only prevent Great Dane from using the requirement that a recipient be at work as of July 1, 1963. The Court of Appeals considered the "term or condition of employment" at issue to be the employer's unilaterally declared vacation "policy." It explicitly disregarded "the question of whether the Board *would* have acted improperly . . . to decide whether it was an unfair labor practice to withhold benefits due *under the contract* . . . ." 363 F. 2d 130, 133. (Emphasis in original.)

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[1] The union elected to terminate the contract raising the question whether any right to vacation pay survived the termination. Also the contract provided for vacation pay when the employee was not actually granted a vacation, and the initial choice lay with the employer. Thus under the contract the employer was not obligated to grant two weeks' additional pay, but could choose to grant vacation instead and lower the total cash outlay. Termination precluded exercise of that choice.

[2] 61 Stat. 156, 29 U. S. C. § 185 (a). This position is supported by the legislative history discussed in *NLRB* v. *C & C Plywood Corp.,* 385 U. S. 421, at 427.

I think the Board and the Court of Appeals were correct in disregarding the contract issue. In *NLRB* v. *C & C Plywood Corp., supra,* which the Court says upholds jurisdiction to consider the contract, we faced a situation in which an employer had taken a unilateral action with respect to wages which was a prima facie violation of § 8 (a)(3) and was attempting to justify that action by contractual privilege. The Court held that the interposition of a contractual defense could not deprive the Board of jurisdiction to "enforce a statutory right" where the Board had "not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer." *Id.,* at 428. Also the agreement involved in that case did not contain an arbitration clause and thus the strong policy favoring arbitration was not infringed by the Board's action. *Id.,* at 426. Here the Court's statement of the issue would imply that the Board may consider an unfair labor practice founded solely on breach of a contractual duty, and the labor agreement seems to invoke the remedy of arbitration.[3] In these circumstances, I think the only issue properly before the Court is whether the employer's unilaterally declared vacation policy, considered on its own bottom, constitutes a violation of § 8 (a)(3) absent a showing of improper motivation by evidence independent of the policy itself.

The Court attempts to resolve this issue as well as the contractual one. In the Court's view an employer must "come forward with evidence of legitimate and substantial business justifications" whenever any of his actions are challenged in a § 8 (a)(3) proceeding. Prior to

[3] Article XIV of the contract provided that arbitration would not be required after one party had given notice of intent to terminate or modify the contract. This disclaimer clearly implies that arbitration would be required in the resolution of disputes arising under the contract.

today's decision, § 8 (a)(3) violations could be grouped into two general categories: those based on actions serving no legitimate business purposes or actions inherently severely destructive of employee rights where improper motive could be inferred from the actions themselves, and, in the latter instance, even a legitimate business purpose could be held by the Board not to justify the employer's conduct, *Labor Board* v. *Erie Resistor Corp.*, 373 U. S. 221; and those not based on actions "demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end," where independent evidence evincing the employer's antiunion animus would be required to find a violation. *Labor Board* v. *Brown*, 380 U. S. 278, 286. The Court is unable to conclude that the employer's conduct in this case falls into the first category, and has proposed its rule as an added gloss on the second whose contours were fixed only two years ago in *Brown*.

Under today's formulation, the Board is required to find independent evidence of the employer's antiunion motive only when the employer has overcome the presumption of unlawful motive which the Court raises. This alteration of the burden in § 8 (a)(3) cases may either be a rule of convenience important to the resolution of this case alone or may, more unfortunately, portend an important shift in the manner of deciding employer unfair labor practice cases under § 8 (a)(3). In either event, I believe it is unwise.

The "legitimate and substantial business justifications" test may be interpreted as requiring only that the employer come forward with a nonfrivolous business purpose in order to make operative the usual requirement of proof of antiunion motive. If this is the result of today's decision, then the Court has merely penalized Great Dane for not anticipating this requirement when arguing before the Board. Such a penalty seems par-

ticularly unfair in view of the clarity of our recent pronouncements that "the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus," *Labor Board* v. *Brown*, 380 U. S., at 288, and that "the Board must find that the employer acted for a proscribed purpose." *American Ship Building Co.* v. *Labor Board*, 380 U. S. 300, 313.

On the other hand, the use of the word "substantial" in the burden of proof formulation may give the Board a power which it formerly had only in § 8 (a)(3) cases like *Erie Resistor, supra.* The Board may seize upon that term to evaluate the merits of the employer's business purposes and weigh them against the harm that befalls the union's interests as a result of the employer's action. If this is the Court's meaning, it may well impinge upon the accepted principle that "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *Labor Board, supra,* at 309. Employers have always been free to take reasonable measures which discourage a strike by pressuring the economic interests of employees, including the extreme measure of hiring permanent replacements, without having the Board inquire into the "substantiality" of their business justifications. *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. If the Court means to change this rule, though I assume it does not, it surely should not do so without argument of the point by the parties and without careful discussion.

In my opinion, the Court of Appeals correctly held that this case fell into the category in which independent evidence of antiunion motive is required to sustain a violation. As was pointed out in the Court of Appeals opinion, a number of legitimate motives for the terms of the vacation policy could be inferred, 363 F. 2d, at 134,

and an unlawful motive is not the sole inference to be drawn from the conduct. Nor is the employer's conduct here, like the super-seniority plan in *Erie Resistor, supra,* such that an unlawful motive can be found by "an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct." *Radio Officers* v. *Labor Board,* 347 U. S. 17, 45. The differences between the facts of this case and those of *Erie Resistor, supra,* are, as the parties recognize, so significant as to preclude analogy. Unlike the granting of super-seniority, the vacation pay policy here had no potential long-term impact on the bargaining situation. The vacation policy was not employed as a weapon against the strike as was the super-seniority plan. Notice of the date of required presence for vacation pay eligibility was not given until after the date had passed. The record shows clearly that Great Dane had no need to employ any such policy to combat the strike, since it had successfully replaced almost all of the striking employees.[4] The Trial Examiner rejected all union claims that particular actions by Great Dane demonstrated antiunion animus. In these circumstances, the Court of Appeals correctly found no substantial evidence of a violation of § 8 (a)(3).

Plainly the Court is concerned lest the strikers in this case be denied their "rights" under the collective bargaining agreement that expired at the commencement of the strike. Equally plainly, a suit under § 301 is the proper manner by which to secure these "rights," if they indeed exist. I think it inappropriate to becloud sound prior interpretations of § 8 (a)(3) simply to reach what seems a sympathetic result.

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[4] By July 1, 1963, almost 75% of the striking employees had been replaced. By August 1, 1963, when the dispute over vacation pay was coming to a head almost 90% had been replaced. All strikers had been replaced by October 8, 1963.

BERGER *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 615. Argued April 13, 1967.—Decided June 12, 1967.

Petitioner was indicted and convicted of conspiracy to bribe the Chairman of the New York State Liquor Authority based upon evidence obtained by eavesdropping. An order pursuant to § 813–a of the N. Y. Code of Crim. Proc. permitting the installation of a recording device in an attorney's office for a period of 60 days was issued by a justice of the State Supreme Court, after he was advised of recorded interviews between a complainant and first an Authority employee and later the attorney in question. Section 813–a authorizes the issuance of an "ex parte order for eavesdropping" upon "oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department." The oath must state "that there is reasonable ground to believe that evidence of a crime may be thus obtained, and particularly describing the person or persons whose communications . . . are to be overheard or recorded and the purpose thereof." The order must specify the duration of the eavesdrop, which may not exceed two months, unless extended. On the basis of leads obtained from this eavesdrop, a second order, also for a 60-day period, permitting an installation elsewhere was issued. After two weeks of eavesdropping a conspiracy, in which petitioner was a "go-between," was uncovered. The New York courts sustained the statute against constitutional challenge. *Held:* The language of § 813–a is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area, and is, therefore, violative of the Fourth and Fourteenth Amendments. Pp. 45–64.

(a) The Fourth Amendment's protections include "conversation," and the use of electronic devices to capture it was a "search" within the meaning of that Amendment. P. 51.

(b) New York's statute authorizes eavesdropping without requiring belief that any particular offense has been or is being committed, nor that the "property" sought, the conversations, be particularly described. Pp. 55–58.

(c) The officer is given a roving commission to "seize" any and all conversations, by virtue of the statute's failure to describe with particularity the conversations sought. P. 59.

(d) Authorization to eavesdrop for a two-month period is equivalent to a series of searches and seizures pursuant to a single showing of probable cause, and avoids prompt execution. P. 59.

(e) The statute permits extensions of the original two-month period on a mere showing that such extension is "in the public interest" without a present showing of probable cause for the continuation of the eavesdrop. P. 59.

(f) The statute places no termination date on the eavesdrop once the conversation sought is seized, but leaves it to the officer's discretion. Pp. 59–60.

(g) While there is no requirement for notice in view of the necessity for secrecy, the statute does not overcome this defect by demanding the showing of exigent circumstances. P. 60.

(h) The statute does not provide for a return on the warrant, thus leaving full discretion in the officer as to the use of the seized conversations of innocent as well as guilty parties. P. 60.

18 N. Y. 2d 638, 219 N. E. 2d 295, reversed.

Joseph E. Brill argued the cause for petitioner. With him on the brief was *Abraham Glasser*.

H. Richard Uviller argued the cause for respondent. With him on the brief were *Frank S. Hogan* and *Alan F. Scribner*.

Briefs of *amici curiae*, urging reversal, were filed by *Jack Grant Day* and *Gerald Zuckerman* for the National Association of Defense Lawyers in Criminal Cases; by *John J. McAvoy* for the New York Civil Liberties Union, and by *Raymond W. Bergan* for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

Briefs of *amici curiae*, urging affirmance, were filed by *Louis J. Lefkowitz*, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Amy Juviler*, Assistant Attorney General, for the Attorney General of the State of New York, and by *G. Robert Blakey* for Elliot L. Richardson, Attorney General of Massachusetts, *Robert Y. Thornton*, Attorney General of Oregon, and the National District Attorneys' Association.

MR. JUSTICE CLARK delivered the opinion of the Court.

This writ tests the validity of New York's permissive eavesdrop statute, N. Y. Code Crim. Proc. § 813–a,[1] under the Fourth, Fifth, Ninth, and Fourteenth Amendments. The claim is that the statute sets up a system of surveillance which involves trespassory intrusions into private, constitutionally protected premises, authorizes

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[1] "§ 813–a. Ex parte order for eavesdropping

"An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958."

"general searches" for "mere evidence," [2] and is an invasion of the privilege against self-incrimination. The trial court upheld the statute, the Appellate Division affirmed without opinion, 25 App. Div. 2d 718, 269 N. Y. S. 2d 368, and the Court of Appeals did likewise by a divided vote. 18 N. Y. 2d 638, 219 N. E. 2d 295. We granted certiorari, 385 U. S. 967 (1966). We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments. This disposition obviates the necessity for any discussion of the other points raised.

I.

Berger, the petitioner, was convicted on two counts of conspiracy to bribe the Chairman of the New York State Liquor Authority. The case arose out of the complaint of one Ralph Pansini to the District Attorney's office that agents of the State Liquor Authority had entered his bar and grill and without cause seized his books and records. Pansini asserted that the raid was in reprisal for his failure to pay a bribe for a liquor license. Numerous complaints had been filed with the District Attorney's office charging the payment of bribes by applicants for liquor licenses. On the direction of that office, Pansini, while equipped with a "minifon" recording device, interviewed an employee of the Authority. The employee advised Pansini that the price for a license was $10,000 and suggested that he contact attorney Harry Neyer. Neyer subsequently told Pansini that he worked with the Authority employee before and that the latter was aware of the going rate on liquor licenses downtown.

[2] This contention is disposed of in *Warden, Maryland Penitentiary* v. *Hayden*, 387 U. S. 294, adversely to petitioner's assertion here.

On the basis of this evidence an eavesdrop order was obtained from a Justice of the State Supreme Court, as provided by § 813–a. The order permitted the installation, for a period of 60 days, of a recording device in Neyer's office. On the basis of leads obtained from this eavesdrop a second order permitting the installation, for a like period, of a recording device in the office of one Harry Steinman was obtained. After some two weeks of eavesdropping a conspiracy was uncovered involving the issuance of liquor licenses for the Playboy and Tenement Clubs, both of New York City. Petitioner was indicted as "a go-between" for the principal conspirators, who though not named in the indictment were disclosed in a bill of particulars. Relevant portions of the recordings were received in evidence at the trial and were played to the jury, all over the objection of the petitioner. The parties have stipulated that the District Attorney "had no information upon which to proceed to present a case to the Grand Jury, or on the basis of which to prosecute" the petitioner except by the use of the eavesdrop evidence.

II.

Eavesdropping is an ancient practice which at common law was condemned as a nuisance. 4 Blackstone, Commentaries 168. At one time the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse. The awkwardness and undignified manner of this method as well as its susceptibility to abuse was immediately recognized. Electricity, however, provided a better vehicle and with the advent of the telegraph surreptitious interception of messages began. As early as 1862 California found it necessary to prohibit the practice by statute. Statutes of California 1862, p. 288, CCLXII. During the Civil War General J. E. B. Stuart

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is reputed to have had his own eavesdropper along with him in the field whose job it was to intercept military communications of the opposing forces. Subsequently newspapers reportedly raided one another's news gathering lines to save energy, time, and money. Racing news was likewise intercepted and flashed to bettors before the official result arrived.

The telephone brought on a new and more modern eavesdropper known as the "wiretapper." Interception was made by a connection with a telephone line. This activity has been with us for three-quarters of a century. Like its cousins, wiretapping proved to be a commercial as well as a police technique. Illinois outlawed it in 1895 and in 1905 California extended its telegraph interception prohibition to the telephone. Some 50 years ago a New York legislative committee found that police, in cooperation with the telephone company, had been tapping telephone lines in New York despite an Act passed in 1895 prohibiting it. During prohibition days wiretaps were the principal source of information relied upon by the police as the basis for prosecutions. In 1934 the Congress outlawed the interception without authorization, and the divulging or publishing of the contents of wiretaps by passing § 605 of the Communications Act of 1934.[3] New York, in 1938, declared by constitutional amendment that "[t]he right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated," but permitted by *ex parte* order of the Supreme Court of the State the interception of communications on a showing of "reasonable ground to believe that evidence of crime" might be obtained. N. Y. Const. Art. I, § 12.

Sophisticated electronic devices have now been developed (commonly known as "bugs") which are capable of

[3] 48 Stat. 1103, 47 U. S. C. § 605.

eavesdropping on anyone in almost any given situation. They are to be distinguished from "wiretaps" which are confined to the interception of telegraphic and telephonic communications. Miniature in size (3/8" x 3/8" x 1/8")—no larger than a postage stamp—these gadgets pick up whispers within a room and broadcast them half a block away to a receiver. It is said that certain types of electronic rays beamed at walls or glass windows are capable of catching voice vibrations as they are bounced off the surfaces. Since 1940 eavesdropping has become a big business. Manufacturing concerns offer complete detection systems which automatically record voices under almost any conditions by remote control. A microphone concealed in a book, a lamp, or other unsuspected place in a room, or made into a fountain pen, tie clasp, lapel button, or cuff link increases the range of these powerful wireless transmitters to a half mile. Receivers pick up the transmission with interference-free reception on a special wave frequency. And, of late, a combination mirror transmitter has been developed which permits not only sight but voice transmission up to 300 feet. Likewise, parabolic microphones, which can overhear conversations without being placed within the premises monitored, have been developed. See Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's, 66 Col. L. Rev. 1003, 1005–1010.

As science developed these detection techniques, lawmakers, sensing the resulting invasion of individual privacy, have provided some statutory protection for the public. Seven States, California, Illinois, Maryland, Massachusetts, Nevada, New York, and Oregon, prohibit surreptitious eavesdropping by mechanical or electronic device.[4] However, all save Illinois permit official court-

[4] Cal. Pen. Code §§ 653h–j; Ill. Rev. Stat., c. 38, §§ 14–1 to 14–7 (1965); Md. Ann. Code, Art. 27, § 125A (1957); Mass. Gen. Laws,

ordered eavesdropping. Some 36 States prohibit wiretapping.[5] But of these, 27 permit "authorized" interception of some type. Federal law, as we have seen, prohibits interception and divulging or publishing of the content of wiretaps without exception.[6] In sum, it is fair to say that wiretapping on the whole is outlawed, except for permissive use by law enforcement officials in

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c. 272, § 99 (Supp. 1966); Nev. Rev. Stat. § 200.650 (1963); N. Y. Pen. Law § 738 (Supp. 1966); Ore. Rev. Stat. § 165.540 (1)(c) (Supp. 1965).

[5] Ala. Code, Tit. 48, § 414 (1958); Alaska Stat. § 42.20.100 (1962); Ark. Stat. Ann. § 73–1810 (1957); Cal. Pen. Code § 640; Colo. Rev. Stat. Ann. § 40–4–17 (1963); Conn. Gen. Stat. Rev. § 53–140 (1958); Del. Code Ann., Tit. 11, § 757 (Supp. 1966); Fla. Stat. § 822.10 (1965); Hawaii Rev. Laws § 309 A–1 (Supp. 1963); Idaho Code Ann. §§ 18–6704, 6705 (1947); Ill. Rev. Stat., c. 134, § 16 (1965); Iowa Code § 716.8 (1962); Ky. Rev. Stat. § 433.430 (1962); La. Rev. Stat. § 14:322 (1950); Md. Ann. Code, Art. 35, §§ 92, 93 (1957); Mass. Gen. Laws, c. 272, § 99 (Supp. 1966); Mich. Stat. Ann. § 28.808 (1954); Mont. Rev. Codes Ann. § 94–3203 (Supp. 1965); Neb. Rev. Stat. § 86–328 (1966); Nev. Rev. Stat. §§ 200.620, 200.630 (1963); N. J. Rev. Stat. § 2A:146–1 (1953); N. M. Stat. Ann. § 40A–12–1 (1964); N. Y. Pen. Law § 738 (Supp. 1966); N. C. Gen. Stat. § 14–155 (1953); N. D. Cent. Code § 8–10–07 (1959); Ohio Rev. Code Ann. § 4931.28 (1954); Okla. Stat., Tit. 21, § 1757 (1961); Ore. Rev. Stat. § 165.540 (1) (Supp. 1965); Pa. Stat. Ann., Tit. 15, § 2443 (1958); R. I. Gen. Laws Ann. § 11–35–12 (1956); S. D. Code § 13.4519 (1939); Tenn. Code Ann. § 65–2117 (1955); Utah Code Ann. § 76–48–11 (1953); Va. Code Ann. § 18.1–156 (1960 Repl. Vol.); Wis. Stat. § 134.39 (1963); Wyo. Stat. Ann. § 37–259 (1957).

[6] A recent Federal Communications Commission Regulation, 31 Fed. Reg. 3400, 47 CFR § 2.701, prohibits the use of "a device required to be licensed by section 301 of the Communications Act" for the purpose of eavesdropping. This regulation, however, exempts use under "lawful authority" by police officers and the sanctions are limited to loss of license and the imposition of a fine. The memorandum accompanying the regulation stated: "What constitutes a crime under State law reflecting State policy applicable to radio eavesdropping is, of course, unaffected by our rules." *Id.*, at 3399.

some States; while electronic eavesdropping is—save for seven States—permitted both officially and privately. And, in six of the seven States electronic eavesdropping ("bugging") is permissible on court order.

III.

The law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge. This is not to say that individual privacy has been relegated to a second-class position for it has been held since Lord Camden's day that intrusions into it are "subversive of all the comforts of society." *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 1066 (1765). And the Founders so decided a quarter of a century later when they declared in the Fourth Amendment that the people had a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Indeed, that right, they wrote, "shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Almost a century thereafter this Court took specific and lengthy notice of *Entick* v. *Carrington, supra,* finding that its holding was undoubtedly familiar to and "in the minds of those who framed the Fourth Amendment . . . ." *Boyd* v. *United States,* 116 U. S. 616, 626–627 (1886). And after quoting from Lord Camden's opinion at some length, Mr. Justice Bradley characterized it thus:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case . . . they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life." At 630.

Boyd held unconstitutional an Act of the Congress authorizing a court of the United States to require a defendant in a revenue case to produce in court his private books, invoices, and papers or else the allegations of the Government were to be taken as confessed. The Court found that "the essence of the offense . . . [was] the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment." *Ibid.* The Act—the Court found—violated the Fourth Amendment in that it authorized a general search contrary to the Amendment's guarantee.

The Amendment, however, carried no criminal sanction, and the federal statutes not affording one, the Court in 1914 formulated and pronounced the federal exclusionary rule in *Weeks* v. *United States,* 232 U. S. 383. Prohibiting the use in federal courts of any evidence seized in violation of the Amendment, the Court held:

> "The effect of the Fourth Amendment is to put the courts of the United States . . . under limitations and restraints as to the exercise of such power . . . and to forever secure the people . . . against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all . . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." At 391–392.

IV.

The Court was faced with its first wiretap case in 1928, *Olmstead* v. *United States,* 277 U. S. 438. There

the interception of Olmstead's telephone line was accomplished without entry upon his premises and was, therefore, found not to be proscribed by the Fourth Amendment. The basis of the decision was that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house. Statements in the opinion that a conversation passing over a telephone wire cannot be said to come within the Fourth Amendment's enumeration of "persons, houses, papers, and effects" have been negated by our subsequent cases as hereinafter noted. They found "conversation" was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a "search" within the meaning of the Amendment, and we so hold. In any event, Congress soon thereafter, and some say in answer to *Olmstead*, specifically prohibited the interception without authorization and the divulging or publishing of the contents of telephonic communications. And the *Nardone* cases, 302 U. S. 379 (1937) and 308 U. S. 338 (1939), extended the exclusionary rule to wiretap evidence offered in federal prosecutions.

The first "bugging" case reached the Court in 1942 in *Goldman* v. *United States*, 316 U. S. 129. There the Court found that the use of a detectaphone placed against an office wall in order to hear private conversations in the office next door did not violate the Fourth Amendment because there was no physical trespass in connection with the relevant interception. And in *On Lee* v. *United States*, 343 U. S. 747 (1952), we found that since "no trespass was committed" a conversation between Lee and a federal agent, occurring in the former's laundry and electronically recorded, was not condemned by the Fourth Amendment. Thereafter in *Silverman* v. *United States*, 365 U. S. 505 (1961), the Court found "that the eavesdropping was accomplished by means of

an unauthorized physical penetration into the premises occupied by the petitioners." At 509. A spike a foot long with a microphone attached to it was inserted under a baseboard into a party wall until it made contact with the heating duct that ran through the entire house occupied by Silverman, making a perfect sounding board through which the conversations in question were overheard. Significantly, the Court held that its decision did "not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area." At 512.

In *Wong Sun* v. *United States*, 371 U. S. 471 (1963), the Court for the first time specifically held that verbal evidence may be the fruit of official illegality under the Fourth Amendment along with the more common tangible fruits of unwarranted intrusion. It used these words:

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman* v. *United States*, 365 U. S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' " At 485.

And in *Lopez* v. *United States*, 373 U. S. 427 (1963), the Court confirmed that it had "in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. . . . It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area." At 438–439. In

this case a recording of a conversation between a federal agent and the petitioner in which the latter offered the agent a bribe was admitted in evidence. Rather than constituting "eavesdropping" the Court found that the recording "was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." At 439.

V.

It is now well settled that "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth" Amendment. *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961). "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949). And its "fundamental protections . . . are guaranteed . . . against invasion by the States." *Stanford* v. *Texas,* 379 U. S. 476, 481 (1965). This right has most recently received enunciation in *Camara* v. *Municipal Court,* 387 U. S. 523. "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." At 528. Likewise the Court has decided that while the "standards of reasonableness" required under the Fourth Amendment are the same under the Fourteenth, they "are not susceptible of Procrustean application . . . ." *Ker* v. *California,* 374 U. S. 23, 33 (1963). We said there that "the reasonableness of a search is . . . [to be determined] by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment." *Ibid.*

We, therefore, turn to New York's statute to determine the basis of the search and seizure authorized by it upon the order of a state supreme court justice, a county judge or general sessions judge of New York County. Section 813-a authorizes the issuance of an "ex parte order for eavesdropping" upon "oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof . . . ." The oath must state "that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and . . . identifying the particular telephone number or telegraph line involved." The judge "may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application." The order must specify the duration of the eavesdrop—not exceeding two months unless extended—and "[a]ny such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein."

While New York's statute satisfies the Fourth Amendment's requirement that a neutral and detached authority be interposed between the police and the public, *Johnson* v. *United States*, 333 U. S. 10, 14 (1948), the broad sweep of the statute is immediately observable. It permits the issuance of the order, or warrant for eavesdropping, upon the oath of the attorney general, the district attorney or any police officer above the rank of sergeant stating that "there is reasonable ground to believe that evidence of crime may be thus obtained . . . ." Such a requirement raises a serious

probable-cause question under the Fourth Amendment. Under it warrants may only issue "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162 (1925); *Husty* v. *United States,* 282 U. S. 694, 700–701 (1931); *Brinegar* v. *United States,* 338 U. S. 160, 175–176 (1949).

It is said, however, by the petitioner, and the State agrees, that the "reasonable ground" requirement of § 813–a "is undisputedly equivalent to the probable cause requirement of the Fourth Amendment." This is indicated by *People* v. *Grossman,* 45 Misc. 2d 557, 257 N. Y. S. 2d 266, reversed on other grounds, 27 App. Div. 2d 572, 276 N. Y. S. 2d 168. Also see *People* v. *Beshany,* 43 Misc. 2d 521, 252 N. Y. S. 2d 110. While we have found no case on the point by New York's highest court, we need not pursue the question further because we have concluded that the statute is deficient on its face in other respects. Since petitioner clearly has standing to challenge the statute, being indisputably affected by it, we need not consider either the sufficiency of the affidavits upon which the eavesdrop orders were based, or the standing of petitioner to attack the search and seizure made thereunder.

The Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also "particularly describing the place to be searched, and the persons or things to be seized." New York's statute lacks this particularization. It merely says that a warrant may issue on reasonable

ground to believe that evidence of crime may be obtained by the eavesdrop. It lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor "the place to be searched," or "the persons or things to be seized" as specifically required by the Fourth Amendment. The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. As was said in *Osborn* v. *United States*, 385 U. S. 323 (1966), the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments," and imposes "a heavier responsibility on this Court in its supervision of the fairness of procedures . . . ." At 329, n. 7. There, two judges acting jointly authorized the installation of a device on the person of a prospective witness to record conversations between him and an attorney for a defendant then on trial in the United States District Court. The judicial authorization was based on an affidavit of the witness setting out in detail previous conversations between the witness and the attorney concerning the bribery of jurors in the case. The recording device was, as the Court said, authorized "under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity' " of the Fourth Amendment. The Court was asked to exclude the evidence of the recording of the conversations seized pursuant to the order on constitutional grounds, *Weeks* v. *United States, supra,* or in the exercise of supervisory power, *McNabb* v. *United States,* 318 U. S. 332 (1943). The Court refused to do so finding that the recording, although an invasion of the privacy protected by the

Fourth Amendment, was admissible because of the authorization of the judges, based upon "a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice . . . for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations." At 330. The invasion was lawful because there was sufficient proof to obtain a search warrant to make the search for the limited purpose outlined in the order of the judges. Through these "precise and discriminate" procedures the order authorizing the use of the electronic device afforded similar protections to those that are present in the use of conventional warrants authorizing the seizure of tangible evidence. Among other safeguards, the order described the type of conversation sought with particularity, thus indicating the specific objective of the Government in entering the constitutionally protected area and the limitations placed upon the officer executing the warrant. Under it the officer could not search unauthorized areas; likewise, once the property sought, and for which the order was issued, was found the officer could not use the order as a passkey to further search. In addition, the order authorized one limited intrusion rather than a series or a continuous surveillance. And, we note that a new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one. Moreover, the order was executed by the officer with dispatch, not over a prolonged and extended period. In this manner no greater invasion of privacy was permitted than was necessary under the circumstances. Finally the officer was required to and did make a return on the order showing how it was executed and what was seized. Through these strict precautions the danger of an unlawful search and seizure was minimized.

By contrast, New York's statute lays down no such "precise and discriminate" requirements. Indeed, it authorizes the "indiscriminate use" of electronic devices as specifically condemned in *Osborn*. "The proceeding by search warrant is a drastic one," *Sgro* v. *United States*, 287 U. S. 206, 210 (1932), and must be carefully circumscribed so as to prevent unauthorized invasions of "the sanctity of a man's home and the privacies of life." *Boyd* v. *United States*, 116 U. S. 616, 630. New York's broadside authorization rather than being "carefully circumscribed" so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, and which were then known as "general warrants." The use of the latter was a motivating factor behind the Declaration of Independence. In view of the many cases commenting on the practice it is sufficient here to point out that under these "general warrants" customs officials were given blanket authority to conduct general searches for goods imported to the Colonies in violation of the tax laws of the Crown. The Fourth Amendment's requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized," repudiated these general warrants and "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U. S. 192, 196 (1927); *Stanford* v. *Texas*, *supra*.

We believe the statute here is equally offensive. First, as we have mentioned, eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the "property"

sought, the conversations, be particularly described. The purpose of the probable-cause requirement of the Fourth Amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed, is thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations. It is true that the statute requires the naming of "the person or persons whose communications, conversations or discussions are to be overheard or recorded . . . ." But this does no more than identify the person whose constitutionally protected area is to be invaded rather than "particularly describing" the communications, conversations, or discussions to be seized. As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. Moreover, the statute permits, and there were authorized here, extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is "in the public interest." Apparently the original grounds on which the eavesdrop order was initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop. Third, the statute places no termination date on the eavesdrop once the conversation sought is

seized. This is left entirely in the discretion of the officer. Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures.

VI.

It is said with fervor that electronic eavesdropping is a most important technique of law enforcement and that outlawing it will severely cripple crime detection. The monumental report of the President's Commission on Law Enforcement and Administration of Justice entitled "The Challenge of Crime in a Free Society" informs us that the majority of law enforcement officials say that this is especially true in the detection of organized crime. As the Commission reports, there can be no question about the serious proportions of professional criminal activity in this country. However, we have found no empirical statistics on the use of electronic devices (bugging) in the fight against organized crime. Indeed, there are even figures available in the wiretap category which indicate to the contrary. See District Attorney Silver's Poll of New York Prosecutors, in Dash, Schwartz & Knowlton, The Eavesdroppers 105, 117–119

(1959). Also see Semerjian, Proposals on Wiretapping in Light of Recent Senate Hearings, 45 B. U. L. Rev. 217, 229. As the Commission points out, "[w]iretapping was the mainstay of the New York attack against organized crime until Federal court decisions intervened. Recently chief reliance in some offices has been placed on bugging, where the information is to be used in court. Law enforcement officials believe that the successes achieved in some parts of the State are attributable primarily to a combination of dedicated and competent personnel and adequate legal tools; and that the failure to do more in New York has resulted primarily from the failure to commit additional resources of time and men," rather than electronic devices. At 201–202. Moreover, Brooklyn's District Attorney Silver's poll of the State of New York indicates that during the 12-year period (1942–1954) duly authorized wiretaps in bribery and corruption cases constituted only a small percentage of the whole. It indicates that this category involved only 10% of the total wiretaps. The overwhelming majority were in the categories of larceny, extortion, coercion, and blackmail, accounting for almost 50%. Organized gambling was about 11%. Statistics are not available on subsequent years. Dash, Schwartz & Knowlton, *supra,* at 40.

An often repeated statement of District Attorney Hogan of New York County was made at a hearing before the Senate Judiciary Committee at which he advocated the amendment of the Communications Act of 1934, *supra,* so as to permit "telephonic interception" of conversations. As he testified, "Federal statutory law [the 1934 Act] has been interpreted in such a way as to bar us from divulging wiretap evidence, even in the courtroom in the course of criminal prosecution." Mr. Hogan then said that "[w]ithout it [wiretaps] my own office could not have convicted" "top figures in

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the underworld." He then named nine persons his office had convicted and one on whom he had furnished "leads" secured from wiretaps to the authorities of New Jersey. Evidence secured from wiretaps, as Mr. Hogan said, was not admissible in "criminal prosecutions." He was advocating that the Congress adopt a measure that would make it admissible; Hearings on S. 2813 and S. 1495, before the Senate Committee on the Judiciary, 87th Cong., 2d Sess., pp. 173, 174 (1962). The President's Commission also emphasizes in its report the need for wiretapping in the investigation of organized crime because of the telephone's "relatively free use" by those engaged in the business and the difficulty of infiltrating their organizations. P. 201. The Congress, though long importuned, has not amended the 1934 Act to permit it.

We are also advised by the Solicitor General of the United States that the Federal Government has abandoned the use of electronic eavesdropping for "prosecutorial purposes." See Supplemental Memorandum, *Schipani* v. *United States*, No. 504, October Term, 1966, 385 U. S. 372. See also *Black* v. *United States*, 385 U. S. 26 (1966); *O'Brien* v. *United States*, 386 U. S. 345 (1967); *Hoffa* v. *United States*, 387 U. S. 231 (1967); *Markis* v. *United States*, 387 U. S. 425; *Moretti* v. *United States*, 387 U. S. 425. Despite these actions of the Federal Government there has been no failure of law enforcement in that field.

As THE CHIEF JUSTICE said in concurring in the result in *Lopez* v. *United States*, 373 U. S. 427, "the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; . . . indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments . . . ." At 441.

In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement.

This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While "[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement," *Lopez* v. *United States, supra,* at 464 (dissenting opinion of BRENNAN, J.), it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certainly and—what is more important—without attending illegality.

It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the "fruits" of eavesdropping devices are barred under the Amendment. On the other hand this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. See *Goldman* v. *United States,* 316 U. S. 129; *On Lee* v. *United States,* 343 U. S. 747; *Lopez* v. *United States, supra;* and *Osborn* v. *United States, supra.* In the latter case the eavesdropping device was permitted where the "commission of a specific offense" was charged, its use was "under the most precise and discriminate circumstances" and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. The Fourth Amendment does not make the "precincts of the home or the office . . . sanctuaries where the law can never reach," DOUGLAS, J., dissenting in *Warden,*

Maryland Penitentiary v. *Hayden*, 387 U. S. 294, 321, but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does.

Reversed.

MR. JUSTICE DOUGLAS, concurring.

I join the opinion of the Court because at long last it overrules *sub silentio Olmstead* v. *United States*, 277 U. S. 438, and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment. I also join the opinion because it condemns electronic surveillance, for its similarity to the general warrants out of which our Revolution sprang and allows a discreet surveillance only on a showing of "probable cause." These safeguards are minimal if we are to live under a regime of wiretapping and other electronic surveillance.

Yet there persists my overriding objection to electronic surveillance, *viz.*, that it is a search for "mere evidence" which, as I have maintained on other occasions (*Osborn* v. *United States*, 385 U. S. 323, 349–354), is a violation of the Fourth and Fifth Amendments, no matter with what nicety and precision a warrant may be drawn, a proposition that I developed in detail in my dissent in *Warden* v. *Hayden*, 387 U. S. 294, 312, decided only the other day.

A discreet selective wiretap or electronic "bugging" is of course not rummaging around, collecting everything in the particular time and space zone. But even though it is limited in time, it is the greatest of all invasions of privacy. It places a government agent in the bedroom, in the business conference, in the social hour, in the

lawyer's office—everywhere and anywhere a "bug" can be placed.

If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home. If anything, the latter is more offensive because the homeowner is completely unaware of the invasion of privacy.

The traditional wiretap or electronic eavesdropping device constitutes a dragnet, sweeping in all conversations within its scope—without regard to the participants or the nature of the conversations. It intrudes upon the privacy of those not even suspected of crime and intercepts the most intimate of conversations. Thus, in the *Coplon* case (*United States* v. *Coplon*, 91 F. Supp. 867, rev'd, 191 F. 2d 749) wiretaps of the defendant's home and office telephones recorded conversations between the defendant and her mother, a quarrel between a husband and wife who had no connection with the case, and conferences between the defendant and her attorney concerning the preparation of briefs, testimony of government witnesses, selection of jurors and trial strategy. Westin, The Wire-Tapping Problem: An Analysis and a Legislative Proposal, 52 Col. L. Rev. 165, 170–171 (1952); Barth, The Loyalty of Free Men 173 (1951). It is also reported that the FBI incidentally learned about an affair, totally unrelated to espionage, between the defendant and a Justice Department attorney. Barth, *supra*, at 173. While tapping one telephone, police recorded conversations involving, at the other end, The Juilliard School of Music, Brooklyn Law School,

Consolidated Radio Artists, Western Union, Mercantile Commercial Bank, several restaurants, a real estate company, a drug store, many attorneys, an importer, a dry cleaning establishment, a number of taverns, a garage, and the Prudential Insurance Company. Westin, *supra*, at 188, n. 112. These cases are but a few of many demonstrating the sweeping nature of electronic total surveillance as we know it today.

It is, of course, possible for a statute to provide that wiretap or electronic eavesdrop evidence is admissible only in a prosecution for the crime to which the showing of probable cause related. See Nev. Rev. Stat. § 200.680 (1963). But such a limitation would not alter the fact that the order authorizes a general search. Whether or not the evidence obtained is used at a trial for another crime, the privacy of the individual has been infringed by the interception of all of his conversations. And, even though the information is not introduced as evidence, it can and probably will be used as leads and background information. Again, a statute could provide that evidence developed from eavesdrop information could not be used at trial. Cf. *Silverthorne Lumber Co., Inc.* v. *United States*, 251 U. S. 385, 392; *Nardone* v. *United States*, 308 U. S. 338; *Silverman* v. *United States*, 365 U. S. 505. But, under a regime of total surveillance, where a multitude of conversations are recorded, it would be very difficult to show which aspects of the information had been used as investigative information.

As my Brother WHITE says in his dissent, this same vice inheres in any search for tangible evidence such as invoices, letters, diaries, and the like. "In searching for seizable matters, the police must necessarily see or hear, and comprehend, items which do not relate to the purpose of the search." That is precisely why the Fourth Amendment made any such rummaging around uncon-

stitutional, even though supported by a formally adequate warrant. That underwrites my dissent in *Hayden*.

With all respect, my Brother BLACK misses the point of the Fourth Amendment. It does not make every search constitutional provided there is a warrant that is technically adequate. The history of the Fourth Amendment, as I have shown in my dissent in the *Hayden* case, makes it plain that any search in the precincts of the home for personal items that are lawfully possessed and not articles of a crime is "unreasonable." That is the essence of the "mere evidence" rule that long obtained until overruled by *Hayden*.

The words that a man says consciously on a radio are public property. But I do not see how government using surreptitious methods can put a person on the radio and use his words to convict him. Under our regime a man stands mute if he chooses, or talks if he chooses. The test is whether he acts voluntarily. That is the essence of the face of privacy protected by the "mere evidence" rule. For the Fourth Amendment and the Fifth come into play when the accused is "the unwilling source of the evidence" (*Gouled* v. *United States*, 255 U. S. 298, 306), there being no difference "whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers." *Ibid.*

That is the essence of my dissent in *Hayden*. In short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence is or can be constitutional under the Fourth and Fifth Amendments. We could amend the Constitution and so provide—a step that would take us closer to the ideological group we profess to despise. Until the amending process ushers us into that kind of totalitarian regime, I would adhere to the protection of privacy which the Fourth Amendment, fashioned in Congress and submitted to the people,

was designed to afford the individual. And unlike my Brother BLACK, I would adhere to *Mapp* v. *Ohio*, 367 U. S. 643, and apply the exclusionary rule in state as well as federal trials—a rule fashioned out of the Fourth Amendment and constituting a high constitutional barricade against the intrusion of Big Brother into the lives of all of us.

MR. JUSTICE STEWART, concurring in the result.

I fully agree with MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE that this New York law is entirely constitutional. In short, I think that "electronic eavesdropping, *as such* or as it is permitted by this statute, is not an unreasonable search and seizure."[1] The statute contains many provisions more stringent than the Fourth Amendment generally requires, as MR. JUSTICE BLACK has so forcefully pointed out. And the petitioner himself has told us that the law's "reasonable grounds" requirement "is undisputedly equivalent to the probable cause requirement of the Fourth Amendment." This is confirmed by decisions of the New York courts. *People* v. *Cohen*, 42 Misc. 2d 403, 248 N. Y. S. 2d 339; *People* v. *Beshany*, 43 Misc. 2d 521, 252 N. Y. S. 2d 110; *People* v. *Grossman*, 45 Misc. 2d 557, 257 N. Y. S. 2d 266. Of course, a state court's construction of a state statute is binding upon us.

In order to hold this statute unconstitutional, therefore, we would have to either rewrite the statute or rewrite the Constitution. I can only conclude that the Court today seems to have rewritten both.

The issue before us, as MR. JUSTICE WHITE says, is "whether *this* search complied with Fourth Amendment standards." For me that issue is an extremely close one

[1] Dissenting opinion of MR. JUSTICE HARLAN, *post*, p. 89, at 94.

in the circumstances of this case. It certainly cannot be resolved by incantation of ritual phrases like "general warrant." Its resolution involves "the unavoidable task in any search and seizure case: was the particular search and seizure reasonable or not?" [2]

I would hold that the affidavits on which the judicial order issued in this case did not constitute a showing of probable cause adequate to justify the authorizing order. The need for particularity and evidence of reliability in the showing required when judicial authorization is sought for the kind of electronic eavesdropping involved in this case is especially great. The standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion. By its very nature electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort. I think the affidavits presented to the judge who authorized the electronic surveillance of the Steinman office failed to meet such a standard.

So far as the record shows, the only basis for the Steinman order consisted of two affidavits. One of them contained factual allegations supported only by bare, unexplained references to "evidence" in the district attorney's office and "evidence" obtained by the Neyer eavesdrop. No underlying facts were presented on the basis of which the judge could evaluate these general allegations. The second affidavit was no more than a statement of another assistant district attorney that he had read his associate's affidavit and was satisfied on that basis alone that proper grounds were presented for the issuance of an authorizing order.

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[2] See dissenting opinion of MR. JUSTICE BLACK, *post*, p. 70, at 83.

This might be enough to satisfy the standards of the Fourth Amendment for a conventional search or arrest. Cf. *Aguilar* v. *Texas*, 378 U. S. 108, 116 (dissenting opinion). But I think it was constitutionally insufficient to constitute probable cause to justify an intrusion of the scope and duration that was permitted in this case.

Accordingly, I would reverse the judgment.

MR. JUSTICE BLACK, dissenting.

New York has an eavesdropping statute which permits its judges to authorize state officers to place on other people's premises electronic devices that will overhear and record telephonic and other conversations for the purpose of detecting secret crimes and conspiracies and obtaining evidence to convict criminals in court. Judges cannot issue such eavesdropping permits except upon oath or affirmation of certain state officers that "there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded, and the purpose thereof . . . ." N. Y. Code Crim. Proc. § 813–a. Evidence obtained by such electronic eavesdropping was used to convict the petitioner here of conspiracy to bribe the chairman of the State Liquor Authority which controls the issuance of liquor licenses in New York. It is stipulated that without this evidence a conviction could not have been obtained, and it seems apparent that use of that evidence showed petitioner to be a briber beyond all reasonable doubt. Notwithstanding petitioner's obvious guilt, however, the Court now strikes down his conviction in a way that plainly makes it impossible ever to convict him again. This is true because the Court not only holds that the judicial orders which were the basis of the authority to eavesdrop were insufficient, but also

holds that the New York eavesdropping statute is *on its face* violative of the Fourth Amendment. And while the Court faintly intimates to the contrary, it seems obvious to me that its holding, by creating obstacles that cannot be overcome, makes it completely impossible for the State or the Federal Government ever to have a valid eavesdropping statute. All of this is done, it seems to me, in part because of the Court's hostility to eavesdropping as "ignoble" and "dirty business" [1] and in part because of fear that rapidly advancing science and technology is making eavesdropping more and more effective. Cf. *Lopez* v. *United States*, 373 U. S. 427, 446 (dissenting opinion of BRENNAN, J.). Neither these, nor any other grounds that I can think of, are sufficient in my judgment to justify a holding that the use of evidence secured by eavesdropping is barred by the Constitution.

I.

Perhaps as good a definition of eavesdropping as another is that it is listening secretly and sometimes "snoopily" to conversations and discussions believed to be private by those who engage in them. Needless to say, eavesdropping is not ranked as one of the most learned or most polite professions, nor perhaps would an eavesdropper be selected by many people as the most desirable and attractive associate. But the practice has undoubtedly gone on since the beginning of human society, and during that time it has developed a usefulness of its own, particularly in the detection and prosecution of crime.

Eavesdroppers have always been deemed competent witnesses in English and American courts. The main test of admissibility has been relevance and first-hand

[1] Mr. Justice Holmes dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 470.

knowledge, not by whom or by what method proffered evidence was obtained. It is true that in England people who obtained evidence by unlawful means were held liable in damages as in *Entick* v. *Carrington,* 19 How. St. Tr. 1029. But even that famous civil liberties case made no departure from the traditional common-law rule that relevant evidence is admissible, even though obtained contrary to ethics, morals, or law. And, for reasons that follow, this evidentiary rule is well adapted to our Government, set up, as it was, to "insure domestic tranquility" under a system of laws.

Today this country is painfully realizing that evidence of crime is difficult for governments to secure. Criminals are shrewd and constantly seek, too often successfully, to conceal their tracks and their outlawry from law officers. But in carrying on their nefarious practices professional criminals usually talk considerably. Naturally, this talk is done, they hope, in a secret way that will keep it from being heard by law enforcement authorities or by others who might report to the authorities. In this situation "eavesdroppers," "informers," and "squealers," as they are variously called, are helpful, even though unpopular, agents of law enforcement. And it needs no empirical studies or statistics to establish that eavesdropping testimony plays an important role in exposing criminals and bands of criminals who but for such evidence would go along their criminal way with little possibility of exposure, prosecution, or punishment. Such, of course, is this particular case before us.

The eavesdrop evidence here shows this petitioner to be a briber, a corrupter of trusted public officials, a poisoner of the honest administration of government, upon which good people must depend to obtain the blessings of a decent orderly society. No man's privacy, property, liberty, or life is secure, if organized or even unorganized criminals can go their way unmolested, ever

and ever further in their unbounded lawlessness. However obnoxious eavesdroppers may be they are assuredly not engaged in a more "ignoble" or "dirty business" than are bribers, thieves, burglars, robbers, rapists, kidnapers, and murderers, not to speak of others. And it cannot be denied that to deal with such specimens of our society, eavesdroppers are not merely useful, they are frequently a necessity. I realize that some may say, "Well, let the prosecuting officers use more scientific measures than eavesdropping." It is always easy to hint at mysterious means available just around the corner to catch outlaws. But crimes, unspeakably horrid crimes, are with us in this country, and we cannot afford to dispense with any known method of detecting and correcting them unless it is forbidden by the Constitution or deemed inadvisable by legislative policy—neither of which I believe to be true about eavesdropping.

II.

Since eavesdrop evidence obtained by individuals is admissible and helpful I can perceive no permissible reason for courts to reject it, even when obtained surreptitiously by machines, electronic or otherwise. Certainly evidence picked up and recorded on a machine is not less trustworthy. In both perception and retention a machine is more accurate than a human listener. The machine does not have to depend on a defective memory to repeat what was said in its presence for it repeats the very words uttered. I realize that there is complaint that sometimes the words are jumbled or indistinct. But machine evidence need not be done away with to correct such occasional defective recording. The trial judge has ample power to refuse to admit indistinct or garbled recordings.

The plain facts are, however, that there is no inherent danger to a defendant in using these electronic record-

ings except that which results from the use of testimony that is so unerringly accurate that it is practically bound to bring about a conviction. In other words, this kind of transcribed eavesdropping evidence is far more likely to lead a judge or jury to reach a correct judgment or verdict—the basic and always-present objective of a trial.

III.

The superior quality of evidence recorded and transcribed on an electronic device is, of course, no excuse for using it against a defendant, if, as the Court holds, its use violates the Fourth Amendment. If that is true, no amount of common-law tradition or anything else can justify admitting such evidence. But I do not believe the Fourth Amendment, or any other, bans the use of evidence obtained by eavesdropping.

There are constitutional amendments that speak in clear unambiguous prohibitions or commands. The First, for illustration, declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fifth declares that a person shall not be held to answer for a capital or otherwise infamous crime except on a grand jury indictment; shall not twice be put in jeopardy of life or limb for the same offense; nor be compelled in any criminal case to be a witness against himself. These provisions of the First and Fifth Amendments, as well as others I need not mention at this time, are clear unconditional commands that something shall not be done. Particularly of interest in comparison with the Fourth Amendment is the Fifth Amendment's prohibition against compelling a person to be a witness against himself. The Fifth Amendment's language forbids a court to hear evidence against a person that he has been compelled to give, without regard to reasonableness or anything else. Unlike all of these just-named Fifth Amendment provisions, the Fourth Amend-

ment relating to searches and seizures contains no such unequivocal commands. It provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Obviously, those who wrote this Fourth Amendment knew from experience that searches and seizures were too valuable to law enforcement to prohibit them entirely, but also knew at the same time that while searches or seizures must not be stopped, they should be slowed down, and warrants should be issued only after studied caution. This accounts for use of the imprecise and flexible term, "unreasonable," the key word permeating this whole Amendment. Also it is noticeable that this Amendment contains no appropriate language, as does the Fifth, to forbid the use and introduction of search and seizure evidence even though secured "unreasonably." Nor does this Fourth Amendment attempt to describe with precision what was meant by its words, "probable cause"; nor by whom the "Oath or affirmation" should be taken; nor what it need contain. Although the Amendment does specifically say that the warrant should particularly describe "the place to be searched, and the persons or things to be seized," it does not impose any precise limits on the spatial or temporal extent of the search or the quantitative extent of the seizure. Thus this Amendment, aimed against only "unreasonable" searches and seizures, seeks to guard against them by providing, as the Court says, that a "neutral and detached authority be interposed between the police and the public, *Johnson* v. *United States,* 333 U. S. 10,

14." And, as the Court admits, the Amendment itself provides no sanctions to enforce its standards of searches, seizures, and warrants. This was left for Congress to carry out if it chose to do so.

Had the framers of this Amendment desired to prohibit the use in court of evidence secured by an unreasonable search or seizure, they would have used plain appropriate language to do so, just as they did in prohibiting the use of enforced self-incriminatory evidence in the Fifth Amendment. Since the Fourth Amendment contains no language forbidding the use of such evidence, I think there is no such constitutional rule. So I continue to believe that the exclusionary rule formulated to bar such evidence in the *Weeks* [2] case is not rooted in the Fourth Amendment but rests on the "supervisory power" of this Court over the other federal courts—the same judicial power invoked in *McNabb* v. *United States*, 318 U. S. 332. See my concurring opinions in *Wolf* v. *Colorado*, 338 U. S. 25, 39, and *Mapp* v. *Ohio*, 367 U. S. 643, 661.[3] For these reasons and others to be stated, I do not believe the Fourth Amendment standing alone, even if applicable to electronic eavesdropping, commands exclusion of the overheard evidence in this case.

In reaching my conclusion that the Fourth Amendment itself does not bar the use of eavesdropping evidence in courts, I do not overlook the fact that the Court at present is reading the Amendment as expressly and unqualifiedly barring invasions of "privacy" rather than merely forbidding "unreasonable searches and seizures."

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[2] *Weeks* v. *United States*, 232 U. S. 383. Compare *Adams* v. *New York*, 192 U. S. 585.

[3] I concurred in *Mapp* because "[t]he close interrelationship between the Fourth and Fifth Amendments," 367 U. S., at 662, as they applied to the facts of that case required the exclusion there of the unconstitutionally seized evidence.

On this premise of the changed command of the Amendment, the Court's task in passing on the use of eavesdropping evidence becomes a simple one. Its syllogism is this:

> The Fourth Amendment forbids invasion of privacy and excludes evidence obtained by such invasion;
>
> To listen secretly to a man's conversations or to tap his telephone conversations invades his privacy;
>
> Therefore, the Fourth Amendment bars use of evidence obtained by eavesdropping or by tapping telephone wires.

The foregoing syllogism is faulty for at least two reasons: (1) the Fourth Amendment itself contains no provision from which can be implied a purpose to bar evidence or anything else secured by an "unreasonable search or seizure"; (2) the Fourth Amendment's language, fairly construed, refers specifically to "unreasonable searches and seizures" and not to a broad undefined right to "privacy" in general. To attempt to transform the meaning of the Amendment, as the Court does here, is to play sleight-of-hand tricks with it. It is impossible for me to think that the wise Framers of the Fourth Amendment would ever have dreamed about drafting an amendment to protect the "right of privacy." That expression, like a chameleon, has a different color for every turning. In fact, use of "privacy" as the keyword in the Fourth Amendment simply gives this Court a useful new tool, as I see it, both to usurp the policy-making power of the Congress and to hold more state and federal laws unconstitutional when the Court entertains a sufficient hostility to them. I therefore cannot agree to hold New York's law unconstitutional on the premise that all laws that unreasonably invade privacy violate the Fourth Amendment.

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IV.

While the electronic eavesdropping here bears some analogy to the problems with which the Fourth Amendment is concerned, I am by no means satisfied that the Amendment controls the constitutionality of such eavesdropping. As pointed out, the Amendment only bans searches and seizures of "persons, houses, papers, and effects." This literal language imports tangible things, and it would require an expansion of the language used by the framers, in the interest of "privacy" or some equally vague judge-made goal, to hold that it applies to the spoken word. It simply requires an imaginative transformation of the English language to say that conversations can be searched and words seized. Referring to wiretapping, this Court in *Olmstead* v. *United States*, 277 U. S. 438, 465, refused to make that transformation:

> "Justice Bradley in the *Boyd* case, and Justice Clark[e] in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed . . . . But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."

Though *Olmstead* has been severely criticized by various individual members of this Court, and though the Court stated an alternative ground for holding the Amendment inapplicable in that case, the *Olmstead* holding that the Fourth Amendment does not apply to efforts to hear and obtain oral conversations has never been overruled by this Court. The Court today, however, suggests that this holding has been "negated" by subsequent congressional action and by four decisions of this Court. First, the Court intimates, though it does not exactly

state, that Congress "in answer to *Olmstead,*" passed an Act to prohibit "the interception without authorization and the divulging or publishing of the contents of telephonic communications." The Court cites no authority for this strange surmise, and I assert with confidence that none can be recited. And even if it could, Congress' action would not have the slightest relevance to the scope of the Fourth Amendment. Second, the Court cites *Goldman* v. *United States,* 316 U. S. 129, and *On Lee* v. *United States,* 343 U. S. 747, in an effort to explain away *Olmstead.* But neither of those cases purported to repudiate the *Olmstead* case or any part of it. In fact, in both of those cases the Court refused to exclude the challenged eavesdrop evidence. Finally, the Court relies on *Silverman* v. *United States,* 365 U. S. 505, and *Wong Sun* v. *United States,* 371 U. S. 471. In both of these cases the Court did imply that the "Fourth Amendment *may* protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects,'" 371 U. S., at 485 (emphasis added), but in neither did the Court find it necessary to overrule *Olmstead,* an action that would have been required had the Court based its exclusion of the oral conversations solely on the ground of the Fourth Amendment. The fact is that both *Silverman* and *Wong Sun* were federal cases dealing with the use of verbal evidence in federal courts, and the Court held the evidence should be excluded by virtue of the exclusionary rule of the *Weeks* case. As I have previously pointed out, that rule rested on the Court's supervisory power over federal courts, not on the Fourth Amendment: it is not required by the Amendment, nor is a violation of the Amendment a prerequisite to its application. I would not have agreed with the Court's opinion in *Silverman,* which, by the way, cited *Olmstead* with approval, had I

thought that the result depended on finding a violation of the Fourth Amendment or had I any inkling that the Court's general statements about the scope of the Amendment were intended to negate the clear holding of *Olmstead*. And again in *Wong Sun*, which did not even mention *Olmstead*, let alone overrule it, the Court clearly based its exclusion of oral statements made to federal agents during an illegal arrest on its supervisory power to deter lawless conduct by federal officers and on the alternative ground that the incriminating statements were made under compulsive circumstances and were not the product of a free will. It is impossible for me to read into that noneavesdropping federal case an intent to overrule *Olmstead* implicitly. In short, the only way this Court can escape *Olmstead* here is to overrule it. Without expressly saying so, the Court's opinion, as my Brother DOUGLAS acknowledges, does just that. And that overruling is accomplished by the simple expedient of substituting for the Amendment's words, "The right of the people to be secure in their persons, houses, papers, and effects," the words "The right of the people to be secure in their privacy," words the Court believes the Framers should have used, but did not. I have frequently stated my opposition to such judicial substitution. Although here the Court uses it to expand the scope of the Fourth Amendment to include words, the Court has been applying the same process to contract the Fifth Amendment's privilege against self-incrimination so as to exclude all types of incriminating evidence but words, or what the Court prefers to call "testimonial evidence." See *United States* v. *Wade*, *post*, p. 218; *Gilbert* v. *California*, *post*, p. 263.

There is yet another reason why I would adhere to the holding of *Olmstead* that the Fourth Amendment does not apply to eavesdropping. Since the Framers in the first clause of the Amendment specified that only persons,

houses, and things were to be protected, they obviously wrote the second clause, regulating search warrants, in reference only to such tangible things. To hold, as the Court does, that the first clause protects words, necessitates either a virtual rewriting of the particularity requirements of the Warrant Clause or a literal application of that clause's requirements and our cases construing them to situations they were never designed to cover. I am convinced that the Framers of the Amendment never intended this Court to do either, and yet it seems to me clear that the Court here does a little of both.

V.

Assuming, as the Court holds, that the Fourth Amendment applies to eavesdropping and that the evidence obtained by an eavesdrop which violates the Fourth Amendment must be excluded in state courts, I disagree with the Court's holding that the New York statute on its face fails to comport with the Amendment. I also agree with my Brother WHITE that the statute as here applied did not violate any of petitioner's Fourth Amendment rights—assuming again that he has some—and that he is not entitled to a reversal of his conviction merely because the statute might have been applied in some way that would not have accorded with the Amendment.

This case deals only with a trespassory eavesdrop, an eavesdrop accomplished by placing "bugging" devices in certain offices. Significantly, the Court does not purport to disturb the *Olmstead-Silverman-Goldman* distinction between eavesdrops which are accompanied by a physical invasion and those that are not. Neither does the Court purport to overrule the holdings of *On Lee* v. *United States*, 343 U. S. 747, and *Lopez* v. *United States*, 373 U. S. 427, which exempt from the Amendment's requirements the use of an electronic device to record, and perhaps even transmit, a conversation to

which the user is a party. It is thus clear that at least certain types of electronic eavesdropping, until today, were completely outside the scope of the Fourth Amendment. Nevertheless, New York has made it a crime to engage in almost any kind of electronic eavesdropping, N. Y. Pen. Law § 738, and the only way eavesdropping, even the kind this Court has held constitutional, can be accomplished with immunity from criminal punishment is pursuant to § 813–a of the Code of Criminal Procedure, N. Y. Pen. Law § 739. The Court now strikes down § 813–a in its entirety, and that may well have the result of making it impossible for state law enforcement officers merely to listen through a closed door by means of an inverted cone or some other crude amplifying device, eavesdropping which this Court has to date refused to hold violative of the Fourth Amendment. Certainly there is no justification for striking down completely New York's statute, covering all kinds of eavesdropping, merely because it fails to contain the "strict precautions" which the Court derives—or more accurately fabricates—as conditions to eavesdrops covered by the Fourth Amendment. In failing to distinguish between types of eavesdropping and in failing to make clear that the New York statute is invalid only as applied to certain kinds of eavesdropping, the Court's opinion leaves the definite impression that all eavesdropping is governed by the Fourth Amendment. Such a step would require overruling of almost every opinion this Court has ever written on the subject. Indeed, from the Court's eavesdropping catalogue of horrors—electronic rays beamed at walls, lapel and cuff-link microphones, and off-premise parabolic microphones—it does not take too much insight to see that the Court is about ready to do, if it has not today done, just that.

I agree with my Brother WHITE that instead of looking for technical defects in the language of the New

York statute, the Court should examine the actual circumstances of its application in this case to determine whether petitioner's rights have here been violated. That to me seems to be the unavoidable task in any search and seizure case: was the particular search and seizure reasonable or not? We have just this Term held that a search and seizure without a warrant and even without authorization of state law, can nevertheless, under all the circumstances, be "reasonable" for Fourth Amendment purposes. *Cooper* v. *California*, 386 U. S. 58. I do not see why that could not be equally true in the case of a search and seizure with a warrant and pursuant to a state law, even though the state law is itself too broad to be valid. Certainly a search and seizure may comply with the Fourth Amendment even in the absence of an authorizing statute which embodies the Amendment's requirements. *Osborn* v. *United States*, 385 U. S. 323, upon which the Court so heavily relies, is a good example of a case where the Court sustained the tape recording of a conversation by examining the particular circumstances surrounding it, even though no federal statute prescribed the precautions taken by the district judges there. Here New York has gone much further than the Federal Government and most of the States to outlaw all eavesdropping except under the limited circumstances of § 813–a, a statute which, as I shall demonstrate, contains many more safeguards than the Fourth Amendment itself. But today New York fares far worse than those States which have done nothing to implement and supplement the Fourth Amendment: it must release a convicted criminal, not because it has deprived him of constitutional rights, but because it has inartfully (according to the Court) tried to guarantee him those rights. The New York statute aside, the affidavits in this case were sufficient to justify a finding of probable cause, and the *ex parte* eavesdrop orders identified the

person whose conversations were to be overheard, the place where the eavesdropping was to take place, and, when read in reference to the supporting affidavits, the type of conversations sought, *i. e.*, those relating to extortion and bribery.

The Court concludes its analysis of § 813–a by asserting that "the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." Even if the Court's fear that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices" justifies it in rewriting the Fourth Amendment to impose on eavesdroppers "strict precautions" which are not imposed on other searchers, it is an undeserved criticism of New York to characterize its studied efforts to regulate eavesdropping as resulting in a statute "without adequate judicial supervision or protective procedures." Let us look at the New York statute. It provides:

(1) New York judges are to issue authorizations. (The Fourth Amendment does not command any such desirable judicial participation.)

(2) The judge must have an "oath" from New York officials. (The Fourth Amendment does not specify who must execute the oath it requires.)

(3) The oath must state "reasonable ground to believe that evidence of crime may be thus obtained," and the judge may examine the affiant and any other witnesses to make certain that this is the case. (The Fourth Amendment requires a showing of "probable cause," but the Court does not dispute New York's assertion that "reasonable ground" and "probable cause" are the same. The Amendment does not specify, as the New York statute does, a procedure by which the judge may "satisfy himself" of the existence of probable cause.)

(4) The "person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof" must be particularly described. (In the case of conversation it would seem impossible to require a more particular description than this. Tangible things in existence at the time a warrant for their seizure is issued could be more particularly described, but the only way to describe future conversations is by a description of the anticipated subject matter of the conversation. When the "purpose" of the eavesdropping is stated, the subject of the conversation sought to be seized is readily recognizable. Nothing more was required in *Osborn;* nothing more should be required here.)

(5) The eavesdrop order must be limited in time to no more than two months. (The Fourth Amendment merely requires that the place to be searched be described. It does not require the warrant to limit the time of a search, and it imposes no limit, other than that of reasonableness, on the dimensions of the place to be searched.)

Thus, it seems impossible for the Court to condemn this statute on the ground that it lacks "adequate judicial supervision or protective procedures." Rather, the only way the Court can invalidate it is to find it lacking in some of the safeguards which the Court today fashions without any reference to the language of the Fourth Amendment whatsoever. In fact, from the deficiencies the Court finds in the New York statute, it seems that the Court would be compelled to strike down a state statute which merely tracked verbatim the language of the Fourth Amendment itself. First, the Court thinks the affidavits or the orders must particularize the crime being committed. The Fourth Amendment's particularity requirement relates to the place searched and the

thing seized, not to the crime being committed. Second, the Court holds that two months for an eavesdrop order to be outstanding is too long. There are, however, no time limits of any kind in the Fourth Amendment other than the notion that a search should not last longer than reasonably necessary to search the place described in the warrant, and the extent of that place may also be limited by the concept of reasonableness. The Court does not explain why two months, regardless of the circumstances, is *per se* an unreasonable length of time to accomplish a verbal search. Third, the Court finds the statute deficient in not providing for a termination of the eavesdrop once the object is obtained and in not providing for a return of the warrant at that time. Where in the Fourth Amendment does the Court think it possible to find these requirements? Finally, the Court makes the fantastic suggestion that the eavesdropper must give notice to the person whose conversation is to be overheard or that the eavesdropper must show "exigent circumstances" before he can perform his eavesdrop without consent. Now, if never before, the Court's purpose is clear: it is determined to ban all eavesdropping. As the Court recognizes, eavesdropping "necessarily . . . depends on secrecy." Since secrecy is an essential, indeed a definitional, element of eavesdropping, when the Court says there shall be no eavesdropping without notice, the Court means to inform the Nation there shall be no eavesdropping—period.

It should now be clear that in order to strike down the New York law the Court has been compelled to rewrite completely the Fourth Amendment. By substituting the word "privacy" for the language of the first clause of the Amendment, the Court expands the scope of the Amendment to include oral conversations; then by applying the literal particularity requirements of the second clause without adjustment for the Court's expan-

sion of the Amendment's scope, the Court makes constitutional eavesdropping improbable; and finally, by inventing requirements found in neither clause— requirements with which neither New York nor any other State can possibly comply—the Court makes such eavesdropping impossible. If the Fourth Amendment does not ban all searches and seizures, I do not see how it can possibly ban all eavesdrops.

VI.

As I see it, the differences between the Court and me in this case rest on different basic beliefs as to our duty in interpreting the Constitution. This basic charter of our Government was written in few words to define governmental powers generally on the one hand and to define governmental limitations on the other. I believe it is the Court's duty to interpret these grants and limitations so as to carry out as nearly as possible the original intent of the Framers. But I do not believe that it is our duty to go further than the Framers did on the theory that the judges are charged with responsibility for keeping the Constitution "up to date." Of course, where the Constitution has stated a broad purpose to be accomplished under any circumstances, we must consider that modern science has made it necessary to use new means in accomplishing the Framers' goal. A good illustration of this is the Commerce Clause which gives Congress power to regulate commerce between the States however it may be carried on, whether by ox wagons or jet planes. But the Fourth Amendment gives no hint that it was designed to put an end to the age-old practice of using eavesdropping to combat crime. If changes in that Amendment are necessary, due to contemporary human reaction to technological advances, I think those changes should be accomplished by amendments, as the Constitution itself provides.

Then again, a constitution like ours is not designed to be a full code of laws as some of our States and some foreign countries have made theirs. And if constitutional provisions require new rules and sanctions to make them as fully effective as might be desired, my belief is that calls for action, not by us, but by Congress or state legislatures, vested with powers to choose between conflicting policies. Here, for illustration, there are widely diverging views about eavesdropping. Some would make it a crime, barring it absolutely and in all events; others would bar it except in searching for evidence in the field of "national security," whatever that means; still others would pass no law either authorizing or forbidding it, leaving it to follow its natural course. This is plainly the type of question that can and should be decided by legislative bodies, unless some constitutional provision *expressly* governs the matter, just as the Fifth Amendment *expressly* forbids enforced self-incrimination. There is no such express prohibition in the Fourth Amendment nor can one be implied. The Fourth Amendment can only be made to prohibit or to regulate eavesdropping by taking away some of its words and by adding others.

Both the States and the National Government are at present confronted with a crime problem that threatens the peace, order, and tranquility of the people. There are, as I have pointed out, some constitutional commands that leave no room for doubt—certain procedures must be followed by courts regardless of how much more difficult they make it to convict and punish for crime. These commands we should enforce firmly and to the letter. But my objection to what the Court does today is the picking out of a broad general provision against unreasonable searches and seizures and the erecting out of it a constitutional obstacle against electronic eavesdropping that makes it impossible for lawmakers to overcome. Honest men may rightly differ on the po-

tential dangers or benefits inherent in electronic eavesdropping and wiretapping. See *Lopez* v. *United States, supra.* But that is the very reason that legislatures, like New York's, should be left free to pass laws about the subject, rather than be told that the Constitution forbids it on grounds no more forceful than the Court has been able to muster in this case.

MR. JUSTICE HARLAN, dissenting.

The Court in recent years has more and more taken to itself sole responsibility for setting the pattern of criminal law enforcement throughout the country. Time-honored distinctions between the constitutional protections afforded against federal authority by the Bill of Rights and those provided against state action by the Fourteenth Amendment have been obliterated, thus increasingly subjecting state criminal law enforcement policies to oversight by this Court. See, *e. g., Mapp* v. *Ohio,* 367 U. S. 643; *Ker* v. *California,* 374 U. S. 23; *Malloy* v. *Hogan,* 378 U. S. 1; *Murphy* v. *Waterfront Commission,* 378 U. S. 52. Newly contrived constitutional rights have been established without any apparent concern for the empirical process that goes with legislative reform. See, *e. g., Miranda* v. *Arizona,* 384 U. S. 436. And overlying the particular decisions to which this course has given rise is the fact that, short of future action by this Court, their impact can only be undone or modified by the slow and uncertain process of constitutional amendment.

Today's decision is in this mold. Despite the fact that the use of electronic eavesdropping devices as instruments of criminal law enforcement is currently being comprehensively addressed by the Congress and various other bodies in the country, the Court has chosen, quite unnecessarily, to decide this case in a manner which will seriously restrict, if not entirely thwart, such efforts,

and will freeze further progress in this field, except as the Court may itself act or a constitutional amendment may set things right.

In my opinion what the Court is doing is very wrong, and I must respectfully dissent.

I.

I am, at the outset, divided from the majority by the way in which it has determined to approach the case. Without pausing to explain or to justify its reasoning, it has undertaken both to circumvent rules which have hitherto governed the presentation of constitutional issues to this Court, and to disregard the construction consistently attributed to a state statute by the State's own courts. Each of these omissions is, in my opinion, most unfortunate.

The Court declares, without further explanation, that since petitioner was "affected" by § 813–a, he may challenge its validity on its face. Nothing in the cases of this Court supports this wholly ambiguous standard; the Court until now has, in recognition of the intense difficulties so wide a rule might create for the orderly adjudication of constitutional issues, limited the situations in which state statutes may be challenged on their face. There is no reason here, apart from the momentary conveniences of this case, to abandon those limitations: none of the circumstances which have before properly been thought to warrant challenges of statutes on their face is present, cf. *Thornhill* v. *Alabama,* 310 U. S. 88, 98, and no justification for additional exceptions has been offered. See generally *United States* v. *National Dairy Products Corp.,* 372 U. S. 29, 36; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 521 (dissenting opinion). Petitioner's rights, and those of others similarly situated, can be fully vindicated through the adjudication of the consistency

with the Fourteenth Amendment of each eavesdropping order.

If the statute is to be assessed on its face, the Court should at least adhere to the principle that, for purposes of assessing the validity under the Constitution of a state statute, the construction given the statute by the State's courts is conclusive of its scope and meaning. *Fox* v. *Washington,* 236 U. S. 273; *Winters* v. *New York,* 333 U. S. 507; *Poulos* v. *New Hampshire,* 345 U. S. 395. This principle is ultimately a consequence of the differences in function of the state and federal judicial systems. The strength with which it has hitherto been held may be estimated in part by the frequency with which the Court has in the past declined to adjudicate issues, often of great practical and constitutional importance, until the state courts "have been afforded a reasonable opportunity to pass upon them." *Harrison* v. *NAACP,* 360 U. S. 167, 176. See, *e. g., Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496; *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101; *Shipman* v. *DuPre,* 339 U. S. 321; *Albertson* v. *Millard,* 345 U. S. 242; *Government Employees* v. *Windsor,* 353 U. S. 364.

The Court today entirely disregards this principle. In its haste to give force to its distaste for eavesdropping, it has apparently resolved that no attention need be given to the construction of § 813–a adopted by the state courts. Apart from a brief and partial acknowledgment, spurred by petitioner's concession, that the state cases might warrant exploration, the Court has been content simply to compare the terms of the statute with the provisions of the Fourth Amendment; upon discovery that their words differ, it has concluded that the statute is constitutionally impermissible. In sharp contrast, when confronted by Fourth Amendment issues under a federal statute which did not, and does not

now, reproduce *ipsissimis verbis* the Fourth Amendment, 26 U. S. C. § 7607 (2), the Court readily concluded, upon the authority of cases in the courts of appeals, that the statute effectively embodied the Amendment's requirements. *Draper* v. *United States,* 358 U. S. 307, 310 n. And the Court, without the assistance even of state authorities, reached an identical conclusion as to a similar state statute in *Ker* v. *California,* 374 U. S. 23, 36 n. The circumstances of the present case do not come even within the narrow exceptions to the rule that the Court ordinarily awaits a state court's construction before adjudicating the validity of a state statute. Cf. *Dombrowski* v. *Pfister,* 380 U. S. 479; *Baggett* v. *Bullitt,* 377 U. S. 360. The Court has shown no justification for its disregard of existing and pertinent state authorities.

II.

The Court's precipitate neglect of the New York cases is the more obviously regrettable when their terms are examined, for they make quite plain that the state courts have fully recognized the applicability of the relevant federal constitutional requirements, and that they have construed § 813–a in conformity with those requirements. Opinions of the state courts repeatedly suggest that the "reasonable grounds" prescribed by the section are understood to be synonymous with the "probable cause" demanded by the Fourth and Fourteenth Amendments. *People* v. *Cohen,* 42 Misc. 2d 403, 404, 248 N. Y. S. 2d 339, 341; *People* v. *Grossman,* 45 Misc. 2d 557, 568, 257 N. Y. S. 2d 266, 277; *People* v. *Beshany,* 43 Misc. 2d 521, 525, 252 N. Y. S. 2d 110, 115. The terms are frequently employed interchangeably, without the least suggestion of any shadings of meaning. See, *e. g., People* v. *Rogers,* 46 Misc. 2d 860, 863, 261 N. Y. S. 2d 152, 155; *People* v. *McDonough,* 51 Misc. 2d 1065, 1069, 275 N. Y. S. 2d 8, 12. Further, a lower state court

has stated quite specifically that "the same standards, at the least, must be applied" to orders under § 813–a as to warrants for the search and seizure of tangible objects. *People* v. *Cohen, supra,* at 407–408, 248 N. Y. S. 2d, at 344. Indeed, the court went on to say that the standards "should be much more stringent than those applied to search warrants." *Id.,* at 408, 248 N. Y. S. 2d, at 344. Compare *Siegel* v. *People,* 16 N. Y. 2d 330, 332, 213 N. E. 2d 682, 683. The court in *Cohen* was concerned with a wiretap order, but the order had been issued under § 813–a, and there was no suggestion there or elsewhere that eavesdropping orders should be differently treated. New York's statutory requirements for search warrants, it must be emphasized, are virtually a literal reiteration of the terms of the Fourth Amendment. N. Y. Code Crim. Proc. § 793. If the Court wished a precise invocation of the terms of the Fourth Amendment, it had only to examine the pertinent state authorities.

There is still additional evidence that the State fully recognizes the applicability to eavesdropping orders of the Fourth Amendment's constraints. The Legislature of New York adopted in 1962 comprehensive restrictions upon the use of eavesdropped information obtained without a prior § 813–a order. N. Y. Civ. Prac. § 4506. The restrictions were expected and intended to give full force to the mandate of the opinion for this Court in *Mapp* v. *Ohio,* 367 U. S. 643. See 2 McKinney's Session Laws of New York 3677 (1962); New York State Legislative Annual 16 (1962). If it was then supposed that information obtained without a prior § 813–a order must, as a consequence of *Mapp,* be excluded from evidence, but that evidence obtained with a § 813–a order need not be excluded, it can only have been assumed that the requirements applicable to the issuance of § 813–a orders were entirely consistent with the demands of the Fourth and Fourteenth Amendments. The legislature recog-

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nized the "hiatus" in its law created by *Mapp*, and wished to set its own "house . . . in order." New York State Legislative Annual, *supra*, at 18. It plainly understood that the Amendments were applicable, and intended to adhere fully to their requirements.

New York's permissive eavesdropping statute must, for purposes of assessing its constitutional validity on its face, be read "as though" this judicial gloss had been "written into" it. *Poulos* v. *New Hampshire*, *supra*, at 402. I can only conclude that, so read, the statute incorporates as limitations upon its employment the requirements of the Fourth Amendment.

III.

The Court has frequently observed that the Fourth Amendment's two clauses impose separate, although related, limitations upon searches and seizures; the first "is general and forbids every search that is unreasonable," *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357; the second places a number of specific constraints upon the issuance and character of warrants. It would be inappropriate and fruitless to undertake now to set the perimeters of "reasonableness" with respect to eavesdropping orders in general; any limitations, for example, necessary upon the period over which eavesdropping may be conducted, or upon the use of intercepted information unconnected with the offenses for which the eavesdropping order was first issued, should properly be developed only through a case-by-case examination of the pertinent questions. It suffices here to emphasize that, in my view, electronic eavesdropping, *as such* or as it is permitted by this statute, is not an unreasonable search and seizure.

At the least, reasonableness surely implies that this Court must not constrain in any grudging fashion the development of procedures, consistent with the Amendment's essential purposes, by which methods of search and seizure unknown in 1789 may be appropriately con-

trolled. It is instead obliged to permit, and indeed even to encourage, serious efforts to approach constructively the difficult problems created by electronic eavesdropping. In this situation, the Court should recognize and give weight to the State's careful efforts to restrict the excessive or unauthorized employment of these devices. New York has provided that no use may be made of eavesdropping devices without a prior court order, and that such an order is obtainable only upon the application of state prosecutorial authorities or of policemen of suitable seniority. N. Y. Code Crim. Proc. § 813–a. Eavesdropping conducted without an order is punishable by imprisonment for as much as two years. N. Y. Pen. Law §§ 738, 740. Information obtained through impermissible eavesdropping may not be employed for any purpose in any civil or criminal action, proceeding, or hearing, except in the criminal prosecution of the unauthorized eavesdropper himself. N. Y. Civ. Prac. § 4506. These restrictions are calculated to prevent the "unbridled,"[1] "unauthorized,"[2] and "indiscriminate"[3] electronic searches and seizures which members of this Court have frequently condemned. Surely the State's efforts warrant at least a careful, and even sympathetic, examination of the fashion in which the state courts have construed these provisions, and in which they have applied them to the situation before us. I cannot, in any event, agree that the Fourth Amendment can properly be taken as a roadblock to the use, within appropriate limits, of law enforcement techniques necessary to keep abreast of modern-day criminal activity. The importance of these devices as a tool of effective law enforcement is impressively attested by the data marshalled in my Brother WHITE's dissenting opinion. *Post*, p. 107.

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[1] *Hoffa* v. *United States*, 385 U. S. 293, 317 (dissenting opinion).

[2] *Silverman* v. *United States*, 365 U. S. 505, 510.

[3] *Lopez* v. *United States*, 373 U. S. 427, 441 (opinion concurring in result).

IV.

I turn to what properly is the central issue in this case: the validity under the Warrants Clause of the Fourth Amendment of the eavesdropping order under which the recordings employed at petitioner's trial were obtained. It is essential first to set out certain of the pertinent facts.

The disputed recordings were made under the authority of a § 813–a order, dated June 12, 1962, permitting the installation of an eavesdropping device in the business office of one Harry Steinman; the order, in turn, was, so far as this record shows, issued solely upon the basis of information contained in affidavits submitted to the issuing judge by two assistant district attorneys. The first affidavit, signed by Assistant District Attorney Goldstein, indicated that the Rackets Bureau of the District Attorney's Office of New York County was then conducting an investigation of alleged corruption in the State Liquor Authority, and that the Bureau had received information that persons desiring to obtain or retain liquor licenses were obliged to pay large sums to officials of the Authority. It described the methods by which the bribe money was transmitted through certain attorneys to the officials. The affidavit asserted that one Harry Neyer, a former employee of the Authority, served as a "conduit." It indicated that evidence had been obtained "over a duly authorized eavesdropping device installed in the office of the aforesaid Harry Neyer," that conferences "relative to the payment of unlawful fees" occurred in Steinman's office. The number and street address of the office were provided. The affidavit specified that the "evidence indicates that the said Harry Steinman has agreed to pay, through the aforesaid Harry Neyer, $30,000" in order to secure a license for the Palladium Ballroom, an establishment

within New York City. The Palladium, it was noted, had been the subject of hearings before the Authority "because of narcotic arrests therein." On the basis of this information, the affidavit sought an order to install a recording device in Steinman's business office.

The second affidavit, signed by Assistant District Attorney Scotti, averred that Scotti, as the Chief of the Bureau to which Goldstein was assigned, had read Goldstein's affidavit, and had concluded that the order might properly issue under § 813–a.

The order as issued permitted the recording of "any and all conversations, communications and discussions" in Steinman's business office for a period of 60 days.

The central objections mounted to this order by petitioner, and repeated as to the statute itself by the Court, are three: first, that it fails to specify with adequate particularity the conversations to be seized; second, that it permits a general and indiscriminate search and seizure; and third, that the order was issued without a showing of probable cause.[4]

Each of the first two objections depends principally upon a problem of definition: the meaning in this context of the constitutional distinction between "search" and "seizure." If listening alone completes a "seizure," it would be virtually impossible for state authorities at a probable cause hearing to describe with particularity the seizures which would later be made during extended eavesdropping; correspondingly, seizures would unavoidably be made which lacked any sufficient nexus with the

[4] Two of petitioner's other contentions are plainly foreclosed by recent opinions of this Court. His contention that eavesdropping unavoidably infringes the rule forbidding the seizure of "mere evidence" is precluded by *Warden* v. *Hayden*, 387 U. S. 294. His contention that eavesdropping violates his constitutional privilege against self-incrimination is answered by *Osborn* v. *United States*, 385 U. S. 323, and *Hoffa* v. *United States*, 385 U. S. 293.

offenses for which the order was first issued. Cf. *Kremen* v. *United States*, 353 U. S. 346; *Warden* v. *Hayden*, 387 U. S. 294. There is no need for present purposes to explore at length the question's subtleties; it suffices to indicate that, in my view, conversations are not "seized" either by eavesdropping alone, or by their recording so that they may later be heard at the eavesdropper's convenience. Just as some exercise of dominion, beyond mere perception, is necessary for the seizure of tangibles, so some use of the conversation beyond the initial listening process is required for the seizure of the spoken word. Cf. *Lopez* v. *United States*, 373 U. S. 427, 459 (dissenting opinion); *United States* v. *On Lee*, 193 F. 2d 306, 313–314 (dissenting opinion); *District of Columbia* v. *Little*, 85 U. S. App. D. C. 242, 247, 178 F. 2d 13, 18, affirmed on other grounds, 339 U. S. 1. With this premise, I turn to these three objections.

The "particularity" demanded by the Fourth Amendment has never been thought by this Court to be reducible "to formula"; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 209; it has instead been made plain that its measurement must take fully into account the character both of the materials to be seized and of the purposes of the seizures. Accordingly, where the materials "are books, and the basis for their seizure is the ideas which they contain," the most "scrupulous exactitude" is demanded in the warrant's description; *Stanford* v. *Texas*, 379 U. S. 476, 485; see also *Marcus* v. *Search Warrant*, 367 U. S. 717; but where the special problems associated with the First Amendment are not involved, as they are not here, a more "reasonable particularity," *Brown* v. *United States*, 276 U. S. 134, 143; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554, is permissible. The degree of particularity necessary is best measured by that requirement's purposes. The central purpose of the particularity requirement is to leave "nothing . . . to the discretion of the officer exe-

cuting the warrant," *Marron* v. *United States,* 275 U. S. 192, 196, by describing the materials to be seized with precision sufficient to prevent "the seizure of one thing under a warrant describing another." *Ibid.* The state authorities are not compelled at the probable cause hearing to wager, upon penalty of a subsequent reversal, that they can successfully predict each of the characteristics of the materials which they will later seize, cf. *Consolidated Rendering Co.* v. *Vermont, supra,* at 554; such a demand would, by discouraging the use of the judicial process, defeat the Amendment's central purpose. *United States* v. *Ventresca,* 380 U. S. 102, 108.

The materials to be seized are instead described with sufficient particularity if the warrant readily permits their identification both by those entrusted with the warrant's execution and by the court in any subsequent judicial proceeding. "It is," the Court has said with reference to the particularity of the place to be searched, "enough if the description is such that the officer . . . can with reasonable effort ascertain and identify" the warrant's objects. *Steele* v. *United States No. 1,* 267 U. S. 498, 503.

These standards must be equally applicable to the seizure of words, and, under them, this order did not lack the requisite particularity. The order here permitted the interception, or search, of any and all conversations occurring within the order's time limitations at the specified location; but this direction must be read in light of the terms of the affidavits, which, under § 813, form part of the authority for the eavesdropping. The affidavits make plain that, among the intercepted conversations, the police were authorized to seize only those "relative to the payment of unlawful fees necessary to obtain liquor licenses." These directions sufficed to provide a standard which left nothing in the choice of materials to be seized to the "whim," *Stanford* v. *Texas, supra,* at 485, of the state authorities. There could be no difficulty,

either in the course of the search or in any subsequent judicial proceeding, in determining whether specific conversations were among those authorized for seizure by the order. The Fourth and Fourteenth Amendments do not demand more. Compare Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891, 913.

Nor was the order invalid because it permitted the search of any and all conversations occurring at the specified location; if the requisite papers have identified the materials to be seized with sufficient particularity, as they did here, and if the search was confined to an appropriate area, the order is not invalidated by the examination of all within that area reasonably necessary for discovery of the materials to be seized. I do not doubt that searches by eavesdrop must be confined in time precisely as the search for tangibles is confined in space, but the actual duration of the intrusion here, or for that matter the total period authorized by the order, was not, given the character of the offenses involved, excessive. All the disputed evidence was obtained within 13 days, scarcely unreasonable in light of an alleged conspiracy involving many individuals and a lengthy series of transactions.

The question therefore remains only whether, as petitioner suggests, the order was issued without an adequate showing of probable cause. The standards for the measurement of probable cause have often been explicated in the opinions of this Court; see, *e. g., United States* v. *Ventresca,* 380 U. S. 102; its suffices now simply to emphasize that the information presented to the magistrate or commissioner must permit him to "judge for himself the persuasiveness of the facts relied on by a complaining officer." *Giordenello* v. *United States,* 357 U. S. 480, 486. The magistrate must "assess independently the probability" that the facts are as the

complainant has alleged; *id.*, at 487; he may not "accept without question the complainant's mere conclusion." *Id.*, at 486.

As measured by the terms of the affidavits here, the issuing judge could properly have concluded that probable cause existed for the order. Unlike the situations in *Nathanson* v. *United States*, 290 U. S. 41, and *Giordenello* v. *United States*, *supra*, the judge was provided the evidence which supported the affiants' conclusions; he was not compelled to rely merely on their "affirmation of suspicion and belief," *Nathanson* v. *United States*, *supra*, at 46. Compare *Rugendorf* v. *United States*, 376 U. S. 528; *Aguilar* v. *Texas*, 378 U. S. 108. In my opinion, taking the Steinman affidavits on their face, the constitutional requirements of probable cause were fully satisfied.

V.

It is, however, plain that the Steinman order was issued principally upon the basis of evidence obtained under the authority of the Neyer order; absent the Neyer eavesdropped evidence, the Steinman affidavits consist entirely of conclusory assertions, and they would, in my judgment, be insufficient. It is, therefore, also necessary to examine the Neyer order.

The threshold issue is whether petitioner has standing to challenge the validity under the Constitution of the Neyer order. Standing to challenge the constitutional validity of a search and seizure has been an issue of some difficulty and uncertainty; [5] it has, nevertheless, hitherto been thought to hinge, not upon the use against the challenging party of evidence seized during the

[5] See, *e. g.*, Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw. U. L. Rev. 471; Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Chi. L. Rev. 342; Recent Development, Search and Seizure: Admissibility of Illegally Acquired Evidence Against Third Parties, 66 Col. L. Rev. 400.

search, but instead upon whether the privacy of the challenging party's premises or person has been invaded. *Jones* v. *United States,* 362 U. S. 257; *Wong Sun* v. *United States,* 371 U. S. 471. These cases centered upon searches conducted by federal authorities and challenged under Fed. Rule Crim. Proc. 41 (e), but there is no reason now to suppose that any different standard is required by the Fourteenth Amendment for searches conducted by state officials. See generally Maguire, Evidence of Guilt 215–216 (1959).

The record before us does not indicate with precision what information was obtained under the Neyer order, but it appears, and petitioner does not otherwise assert, that petitioner was never present in Neyer's office during the period in which eavesdropping was conducted. There is, moreover, no suggestion that petitioner had any property interest in the premises in which the eavesdropping device was installed. Apart from the use of evidence obtained under the Neyer order to justify issuance of the Steinman order, under which petitioner's privacy was assuredly invaded, petitioner is linked with activities under the Neyer order only by one fleeting and ambiguous reference in the record.

In a pretrial hearing conducted on a motion to suppress the Steinman recordings, counsel for the State briefly described the materials obtained under the Neyer order. Counsel indicated that

> "Mr. Neyer then has conversations with Mr. Steinman and other persons. In the course of some of these conversations, we have one-half of a telephone call, of several telephone calls between Mr. Neyer and a person he refers to on the telephone as Mr. Berger; and in the conversation with Mr. Berger Mr. Neyer discusses also the obtaining of a liquor license for the Palladium and mentions the fact that this is going to be a big one."

Counsel for petitioner responded, shortly after, that "I take it . . . that none of the subject matter to which [counsel for the State] has just adverted is any part of this case . . . ." Counsel for the State responded:

> "That's right, your Honor. I am not—I think evidence can be brought out during the trial that Berger, who Mr. Steinman, Mr. Neyer speaks to concerning the Palladium, is, in fact, the defendant Ralph Berger."

However oblique this invasion of petitioner's personal privacy might at first seem, it would entirely suffice, in my view, to afford petitioner standing to challenge the validity of the Neyer order. It is surely without significance in these circumstances that petitioner did not conduct the conversation from a position physically within the room in which the device was placed; the fortuitousness of his location can matter no more than if he had been present for a conference in Neyer's office, but had not spoken, or had been seated beyond the limits of the device's hearing. The central question should properly be whether his privacy has been violated by the search; it is enough for this purpose that he participated in a discussion into which the recording intruded. Standing should not, in any event, be made an insuperable barrier which unnecessarily deprives of an adequate remedy those whose rights have been abridged; to impose distinctions of excessive refinement upon the doctrine "would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones* v. *United States, supra,* at 267. It would instead "permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *United States* v. *Jeffers,* 342 U. S. 48, 52. I would conclude that, under the circumstances here, the recording of a portion of a telephone conversation to which peti-

tioner was party would suffice to give him standing to challenge the validity under the Constitution of the Neyer order.[6]

Given petitioner's standing under federal law to challenge the validity of the Neyer order, I would conclude that such order was issued without an adequate showing of probable cause. It seems quite plain, from the facts described by the State, that at the moment the Neyer order was sought the Rackets Bureau indeed had ample information to justify the issuance of an eavesdropping order. Nonetheless, the affidavits presented at the Neyer hearing unaccountably contained only the most conclusory allegations of suspicion. The record before us is silent on whether additional information might have been orally presented to the issuing judge.[7] Under these circumstances, I am impelled to the view that the judge lacked sufficient information to permit him to assess the circumstances as a "neutral and detached magistrate," *Johnson* v. *United States,* 333 U. S. 10, 14, and accordingly that the Neyer order was impermissible.

VI.

It does not follow, however, that evidence obtained under the Neyer order could not properly have been

[6] While on this record it cannot be said with entire assurance that the "Berger" mentioned in the Neyer eavesdropped conversation was this petitioner, I think it proper to proceed at this juncture on the basis that such is the case, leaving whatever questions of identity there may be to such state proceedings as, on the premises of this opinion, might subsequently eventuate in the state courts. See n. 8, *infra.*

[7] The only additional reference in the record possibly pertinent to the content of the Neyer hearing is a conclusory assertion by counsel for the State in argument on the motion to suppress that the State had shown its evidence to the issuing judge. The reference is obscure, but its context suggests strongly that counsel meant only that the Steinman affidavits were adequate for purposes of probable cause.

employed to support issuance of the Steinman order. The basic question here is the scope of the exclusionary rule fashioned in *Weeks* v. *United States,* 232 U. S. 383, and made applicable to state proceedings in *Mapp* v. *Ohio,* 367 U. S. 643. The Court determined in *Weeks* that the purposes of the Fourth Amendment could be fully vindicated only if materials seized in violation of its requirements were excluded from subsequent use against parties aggrieved by the seizure. Despite broader statements in certain of the cases, see, *e. g., Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392, the situations for which the *Weeks* rule was devised, and to which it has since been applied, have uniformly involved misconduct by police or prosecutorial authorities. The rule's purposes have thus been said to be both to discourage "disobedience to the Federal Constitution," *Mapp* v. *Ohio, supra,* at 657, and to avoid any possibility that the courts themselves might be "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins* v. *United States,* 364 U. S. 206, 223. The Court has cautioned that the exclusionary rule was not intended to establish supervisory jurisdiction over the administration of state criminal justice, and that the States might still fashion "workable rules governing arrests, searches and seizures." *Ker* v. *California,* 374 U. S. 23, 34.

I find nothing in the terms or purposes of the rule which demands the invalidation, under the circumstances at issue here, of the Steinman order. The state authorities appeared, as the statute requires, before a judicial official, and held themselves ready to provide information to justify the issuance of an eavesdropping order. The necessary evidence was at hand, and there was apparently no reason for the State to have preferred that it not be given to the issuing judge. The Neyer order is thus invalid simply as a consequence of the

judge's willingness to act upon substantially less information than the Fourteenth Amendment obliged him to demand; correspondingly, the only "misconduct" that could be charged against the prosecution consists entirely of its failure to press additional evidence upon him. If the exclusionary rule were to be applied in this and similar situations, praiseworthy efforts of law enforcement authorities would be seriously, and quite unnecessarily, hampered; the evidence lawfully obtained under a lengthy series of valid warrants might, for example, be lost by the haste of a single magistrate. The rule applied in that manner would not encourage police officers to adhere to the requirements of the Constitution; it would simply deprive the State of evidence it has sought in accordance with those requirements.

I would hold that where, as here, authorities have obtained a warrant in a judicial proceeding untainted by fraud, a second warrant issued on the authority of evidence gathered under the first is not invalidated by a subsequent finding that the first was issued without a showing of probable cause.

VII.

It follows that the Steinman order was, as a matter of constitutional requirement, validly issued, that the recordings obtained under it were properly admitted at petitioner's trial, and, accordingly, that his conviction must be affirmed.[8]

[8] Whether N. Y. Civ. Prac. § 4506, as amended to take effect July 1, 1962, some 18 days after the issuance of the Steinman order, would be deemed, under the premises of this opinion, to render inadmissible at Berger's trial the evidence procured under it, is a matter for the state courts to decide. See *People* v. *Cohen*, 42 Misc. 2d 403, 408, 409, 248 N. Y. S. 2d 339, 344, 345; *People* v. *Beshany*, 43 Misc. 2d 521, 532, 252 N. Y. S. 2d 110, 121. Further state proceedings on that score would of course not be foreclosed under a disposition in accordance with this opinion.

MR. JUSTICE WHITE, dissenting.

With all due respect, I dissent from the majority's decision which unjustifiably strikes down "on its face" a 1938 New York statute applied by state officials in securing petitioner's conviction. In addition, I find no violation of petitioner's constitutional rights and I would affirm.

I.

At petitioner's trial for conspiring to bribe the Chairman of the New York State Liquor Authority, the prosecution introduced tape recordings obtained through an eavesdrop of the office of Harry Steinman which had been authorized by court order pursuant to § 813–a, N. Y. Code Crim. Proc. Since Berger was rightfully in Steinman's office when his conversations were recorded through the Steinman eavesdrop, he is entitled to have those recordings excluded at his trial if they were unconstitutionally obtained. *Jones* v. *United States*, 362 U. S. 257; *Silverman* v. *United States*, 365 U. S. 505. Petitioner vigorously argues that all judicially authorized eavesdropping violates Fourth Amendment rights, but his position is unsound.

Two of petitioner's theories are easily answered. First, surreptitious electronic recording of conversations among private persons, and introduction of the recording during a criminal trial, do not violate the Fifth Amendment's ban against compulsory self-incrimination because the conversations are not the product of any official compulsion. *Olmstead* v. *United States*, 277 U. S. 438; *Hoffa* v. *United States*, 385 U. S. 293; *Osborn* v. *United States*, 385 U. S. 323. Second, our decision in *Warden* v. *Hayden*, 387 U. S. 294, answers petitioner's contention that eavesdropping under § 813–a constitutes an unlawful search for "mere evidence"; whatever the limits of the search and seizure power may be under the Fourth Amendment,

the oral evidence of a furtive bribery conspiracy sought in the application for the Steinman eavesdrop order was within the scope of proper police investigation into suspected criminal activity.

Petitioner primarily argues that eavesdropping is invalid, even pursuant to court order or search warrant, because it constitutes a "general search" barred by the Fourth Amendment. Petitioner suggests that the search is inherently overbroad because the eavesdropper will overhear conversations which do not relate to criminal activity. But the same is true of almost all searches of private property which the Fourth Amendment permits. In searching for seizable matters, the police must necessarily see or hear, and comprehend, items which do not relate to the purpose of the search. That this occurs, however, does not render the search invalid, so long as it is authorized by a suitable search warrant and so long as the police, in executing that warrant, limit themselves to searching for items which may constitutionally be seized.[1] Thus, while I would agree with petitioner that individual searches of private property through surreptitious eavesdropping with a warrant must be carefully circumscribed to avoid excessive invasion of privacy and security, I cannot agree that all such intrusions are constitutionally impermissible general searches.

This case boils down, therefore, to the question of whether § 813–a was constitutionally applied in this case. At the outset, it is essential to note that the recordings of the Neyer office eavesdrop were not introduced at petitioner's trial, nor was petitioner present during this electronic surveillance, nor were any of petitioner's words recorded by that eavesdrop. The only links between the

[1] Recording an innocent conversation is no more a "seizure" than occurs when the policeman personally overhears conversation while conducting a search with a warrant.

Neyer eavesdrop and petitioner's conviction are (a) that evidence secured from the Neyer recordings was used in the Steinman affidavits, which in turn led to the Steinman eavesdrop where petitioner's incriminating conversations were overheard; and (b) that the Neyer eavesdrop recorded what *may have been* [2] the Neyer end of a telephone conversation between Neyer and Berger. In my opinion, it is clear that neither of these circumstances is enough to establish that Berger's Fourth Amendment interests were invaded by the eavesdrop in Neyer's office. *Wong Sun* v. *United States*, 371 U. S. 471; *Jones* v. *United States*, 362 U. S. 257. Thus, petitioner cannot secure reversal on the basis of the allegedly unconstitutional Neyer eavesdrop.

I turn to the circumstances surrounding the issuance of the one eavesdrop order which petitioner has "standing" to challenge. On June 11, 1962, Assistant District Attorney David Goldstein filed an affidavit before Judge Joseph Sarafite of the New York County Court of General Sessions requesting a court order under § 813–a authorizing the Steinman eavesdrop. Goldstein averred that the District Attorney's office was investigating

[2] Petitioner has not included a transcript of the Neyer recording in the record before this Court. In an oral statement during the hearing on petitioner's motion to suppress eavesdrop evidence, the prosecutor stated:

"In the course of some of these conversations [recorded by the Neyer eavesdrop], we have one-half of a telephone call, of several telephone calls between Mr. Neyer and a person he refers to on the telephone as Mr. Berger; and in the conversation with Mr. Berger Mr. Neyer discusses also the obtaining of a liquor license for the Palladium and mentions the fact that this is going to be a big one." R., at 27.

Petitioner made no argument, and offered no evidence, at the suppression hearing that the alleged Neyer-Berger phone conversation provided the State with evidence that was used to secure the Steinman eavesdrop order.

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alleged corruption in the State Liquor Authority, that the office had obtained evidence of a conspiracy between Authority officials and private attorneys to extort large illegal payments from liquor license applicants, that a "duly authorized eavesdropping device" had previously been installed in the office of Neyer who was suspected of acting as a conduit for the bribes, and that this device had obtained evidence "that conferences relative to the payment of unlawful fees necessary to obtain liquor licenses occur in the office of one Harry Steinman, located in Room 801 at 15 East 48th Street, in the County, City and State of New York." The affidavit went on to describe Steinman at length as a prospective liquor license applicant and to relate evidence of a specific payoff which Steinman was likely to make, through Neyer, in the immediate future. On the basis of these facts, the affidavit concluded that "there is reasonable ground to believe that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions that may take place in the office of Harry Steinman which is located in Room 801 at 15 East 48th Street," and requested an order authorizing an eavesdrop until August 11, 1962. An affidavit of Assistant District Attorney Alfred Scotti verified the information contained in the Goldstein affidavit. The record also indicates that the affidavits were supplemented by orally presenting to Judge Sarafite all of the evidence obtained from the Neyer eavesdrop. But assuming that the Steinman court order was issued on the affidavits alone, I am confident that those affidavits are sufficient under the Fourth Amendment.

Goldstein's affidavit described with "particularity" what crime Goldstein believed was being committed; it requested authority to search one specific room; it described the principal object of the search—Steinman and his co-conspirators—and the specific conversations

which the affiant hoped to seize; it gave a precise time limit to the search; and it told the judge the manner in which the affiant had acquired his information. Petitioner argues that the reliability of the Neyer eavesdrop information was not adequately verified in the Steinman affidavit. But the Neyer eavesdrop need not be explained in detail in an application to the very judge who had authorized it just two months previously. Judge Sarafite had every reason to conclude that the Neyer eavesdrop was a reliable basis for suspecting a criminal conspiracy (consisting as the recording did of admissions by Steinman and other co-conspirators) and that it was the source of the specific evidence recited in the Steinman affidavits. "[A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion," *United States* v. *Ventresca,* 380 U. S. 102, 108. I conclude that the Steinman affidavits fully satisfied the Fourth Amendment requirements of probable cause and particularity in the issuance of search warrants.

The Court, however, seems irresistibly determined to strike down the New York statute. The majority criticizes the *ex parte* nature of § 813–a court orders, the lack of a requirement that "exigent circumstances" be shown, and the fact that one court order authorizes "a series or a continuous surveillance." But where are such search warrant requirements to be found in the Fourth Amendment or in any prior case construing it? The Court appears intent upon creating out of whole cloth new constitutionally mandated warrant procedures carefully tailored to make eavesdrop warrants unobtainable. That is not a judicial function. The question here is whether *this* search complied with Fourth Amendment standards. There is no indication in this record that the District Attorney's office seized and used conversa-

tions not described in the Goldstein affidavit, nor that officials continued the search after the time when they had gathered the evidence which they sought. Given the constitutional adequacy of the Goldstein affidavit in terms of Fourth Amendment requirements of probable cause and particularity, I conclude that both the search and seizure in Steinman's office satisfied Fourth Amendment mandates. Regardless of how the Court would like eavesdropping legislation to read, our function ends in a state case with the determination of these questions.

II.

Unregulated use of electronic surveillance devices by law enforcement officials and by private parties poses a grave threat to the privacy and security of our citizens. As the majority recognizes, New York is one of a handful of States that have reacted to this threat by enacting legislation that limits official use of all such devices to situations where designated officers obtain judicial authorization to eavesdrop. Except in these States, there is a serious lack of comprehensive and sensible legislation in this field, a need that has been noted by many, including the President's prestigious Commission on Law Enforcement and Administration of Justice (the "Crime Commission") in its just-published reports.[3] Bills have been introduced at this session of Congress to fill this legislative gap, and extensive hearings are in progress before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, and before Subcommittee No. 5 of the House Committee on the Judiciary.

[3] The portion of the Crime Commission's report dealing with wiretapping and eavesdropping is reproduced in Appendix A to this opinion. A more detailed explanation of why most Commission members favored legislation permitting controlled use of electronic surveillance for law enforcement purposes can be found in the Commission's Task Force Report on Organized Crime, cited *infra*.

At least three positions have been presented at these hearings. Opponents of eavesdropping and wiretapping argue that they are so "odious" an invasion of privacy that they should never be tolerated. The Justice Department, in advocating the Administration's current position, asserts a more limited view; its bill would prohibit all wiretapping and eavesdropping by state and federal authorities except in cases involving the "national security," and in addition would ban judicial use of evidence gathered even in national security cases. S. 928 and H. R. 5386, 90th Cong., 1st Sess. Advocates of a third position, who include many New York law enforcement personnel and others, agree that official eavesdropping and wiretapping must be stringently controlled but argue that such methods are irreplaceable investigative tools which are needed for the enforcement of criminal laws and which can be adequately regulated through legislation such as New York's § 813–a.

The grant of certiorari in this case has been widely noted, and our decision can be expected to have a substantial impact on the current legislative consideration of these issues. Today's majority does not, in so many words, hold that all wiretapping and eavesdropping are constitutionally impermissible. But by transparent indirection it achieves practically the same result by striking down the New York statute and imposing a series of requirements for legalized electronic surveillance that will be almost impossible to satisfy.

In so doing, the Court ignores or discounts the need for wiretapping authority and incredibly suggests that there has been no breakdown of federal law enforcement despite the unavailability of a federal statute legalizing electronic surveillance. The Court thereby impliedly disagrees with the carefully documented reports of the Crime Commission which, contrary to the Court's intimations, underline the serious proportions of professional

criminal activity in this country, the failure of current national and state efforts to eliminate it, and the need for a statute permitting carefully controlled official use of electronic surveillance, particularly in dealing with organized crime and official corruption. See Appendix A, *infra;* Report of the Crime Commission's Task Force on Organized Crime 17–19, 80, 91–113 (1967). How the Court can feel itself so much better qualified than the Commission, which spent months on its study, to assess the needs of law enforcement is beyond my comprehension. We have only just decided that reasonableness of a search under the Fourth Amendment must be determined by weighing the invasions of Fourth Amendment interests which wiretapping and eavesdropping entail against the public need justifying such invasions. *Camara* v. *Municipal Court,* 387 U. S. 523; *See* v. *City of Seattle,* 387 U. S. 541. In these terms, it would seem imperative that the Court at least deal with facts of the real world. This the Court utterly fails to do. In my view, its opinion is wholly unresponsive to the test of reasonableness under the Fourth Amendment.

The Court also seeks support in the fact that the Federal Government does not now condone electronic eavesdropping. But here the Court is treading on treacherous ground.[4] It is true that the Department of Justice has now disowned the relevant findings and recommendations of the Crime Commission, see Hearings on H. R. 5386 before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., ser. 3, at 308 (1967) (hereafter cited as "House Hearings"),

[4] The Court should draw no support from the Solicitor General's confession of error in recent cases, for they involved surreptitious eavesdropping by federal officers without judicial authorization. Such searches are clearly invalid because they violate the Fourth Amendment's warrant requirements. *Silverman* v. *United States, supra.*

and that it has recommended to the Congress a bill which would impose broad prohibitions on wiretapping and eavesdropping. But although the Department's communication to the Congress speaks of "exercis[ing] the full reach of our constitutional powers to outlaw electronic eavesdropping on private conversations," [5] the fact is, as I have already indicated, that the bill does nothing of the kind. Both H. R. 5386 and its counterpart in the Senate, S. 928, provide that the prohibitions in the bill shall not be deemed to apply to interceptions in national security cases. Apparently, under this legislation, the President without court order would be permitted to authorize wiretapping or eavesdropping "to protect the Nation against actual or potential attack or other hostile acts of a foreign power or any other serious threat to the security of the United States, or to protect national security information against foreign intelligence activities." H. R. 5386 and S. 928, § 3.

There are several interesting aspects to this proposed national security exemption in light of the Court's opinion. First, there is no limitation on the President's power to delegate his authority, and it seems likely that at least the Attorney General would exercise it. House Hearings, at 302. Second, the national security exception would reach cases like sabotage and investigations of organizations controlled by a foreign government. For example, wiretapping to prove an individual is a member of the Communist Party, it is said, would be permissible under the statute. House Hearings, at 292. Third, information from authorized surveillance in the national security area would not be admissible in evidence; to the contrary, the surveillance would apparently be for investigative and informational use only, not for

[5] Letter from the Acting Attorney General to the Speaker of the House of Representatives submitting the Administration's "Right of Privacy Act of 1967" (H. R. 5386), Feb. 8, 1967.

use in a criminal prosecution and not authorized because of any belief or suspicion that a crime is being committed or is about to be committed. House Hearings, at 289. Fourth, the Department of Justice has recommended that the Congress not await this Court's decision in the case now before us because whether or not the Court upholds the New York statute the power of Congress to enact the proposed legislation would not be affected. House Hearings, at 308. But if electronic surveillance is a "general search," or if it must be circumscribed in the manner the Court now suggests, how can surreptitious electronic surveillance of a suspected Communist or a suspected saboteur escape the strictures of the Fourth Amendment? It seems obvious from the Department of Justice bill that the present Administration believes that there are some purposes and uses of electronic surveillance which do not involve violations of the Fourth Amendment by the Executive Branch. Such being the case, even if the views of the Executive were to be the final answer in this case, the requirements imposed by the Court to constitutionalize wiretapping and eavesdropping are a far cry from the practice anticipated under the proposed federal legislation now before the Congress.

But I do not think the views of the Executive should be dispositive of the broader Fourth Amendment issues raised in this case. If the security of the National Government is a sufficient interest to render eavesdropping reasonable, on what tenable basis can a contrary conclusion be reached when a State asserts a purpose to prevent the corruption of its major officials, to protect the integrity of its fundamental processes, and to maintain itself as a viable institution? The serious threat which organized crime poses to our society has been frequently documented. The interrelation between organized crime

and corruption of governmental officials is likewise well established,[6] and the enormous difficulty of eradicating both forms of social cancer is proved by the persistence of the problems if by nothing else. The Crime Commission has concluded that "only in New York have law enforcement officials been able to mount a relatively continuous and relatively successful attack on an organized crime problem," that "electronic surveillance techniques . . . have been *the* tools" making possible such an attack, and that practice under New York's § 813–a has achieved a proper balance between the interests of "privacy and justice." Task Force Report, at 95. And New York County District Attorney Frank S. Hogan, who has been on the job almost as long as any member of this Court, has said of the need for legislation similar to § 813–a:

> "The judicially supervised system under which we operate has worked. It has served efficiently to protect the rights, liberties, property, and general welfare of the law-abiding members of our community. It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures in the underworld, my own office could not have convicted Charles 'Lucky' Luciano, Jimmy Hines, Louis 'Lepke' Buchalter, Jacob 'Gurrah' Shapiro, Joseph 'Socks' Lanza, George Scalise, Frank Erickson, John 'Dio' Dioguardi, and Frank Carbo. Joseph 'Adonis' Doto,

[6] "All available data indicate that organized crime flourishes only where it has corrupted local officials. As the scope and variety of organized crime's activities have expanded, its need to involve public officials at every level of local government has grown. And as government regulation expands into more and more areas of private and business activity, the power to corrupt likewise affords the corrupter more control over matters affecting the everyday life of each citizen." Task Force Report, at 6.

> who was tried in New Jersey, was convicted and deported on evidence supplied by our office and obtained by assiduously following leads secured through wiretapping." Hearings on S. 2813 before the Senate Committee on the Judiciary, 87th Cong., 2d Sess., at 173 (1962).

To rebut such evidence of the reasonableness of regulated use of official eavesdropping, the Court presents only outdated statistics on the use of § 813–a in the organized crime and corruption arenas, the failure of the Congress thus far to enact similar legislation for federal law enforcement officials, and the blind hope that other "techniques and practices may well be developed that will operate just as speedily and certainly." None of this is even remotely responsive to the question whether the use of eavesdropping techniques to unveil the debilitating corruption involved in this case was reasonable under the Fourth Amendment. At best, the Court puts forth an apologetic and grossly inadequate justification for frustrating New York law enforcement by invalidating § 813–a.

In any event, I do not consider this case a proper vehicle for resolving all of these broad constitutional and legislative issues raised by the problem of official use of wiretapping and eavesdropping. I would hold only that electronic surveillance was a reasonable investigative tool to apply in uncovering corruption among high state officials, compare *Osborn* v. *United States,* 385 U. S. 323, that the § 813–a court procedure as used in this case satisfied the Fourth Amendment's search warrant requirements, and that New York officials limited themselves to a constitutionally permissible search and seizure of petitioner's private conversations in executing that court order. Therefore, I would affirm.

APPENDIX TO OPINION OF MR. JUSTICE WHITE.

Excerpt from "The Challenge of Crime in a Free Society," A Report by the President's Commission on Law Enforcement and Administration of Justice, at 200–203 (1967).

A NATIONAL STRATEGY AGAINST ORGANIZED CRIME

Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's. The public and law enforcement must make a full-scale commitment to destroy the power of organized crime groups. The Commission's program indicates ways to implement that commitment.

PROOF OF CRIMINAL VIOLATION

The previous section has described the difficulties that law enforcement agencies meet in trying to prove the participation of organized crime family members in criminal acts. Although earlier studies indicated a need for new substantive criminal laws, the Commission believes that on the Federal level, and in most State jurisdictions where organized crime exists, the major problem relates to matters of proof rather than inadequacy of substantive criminal laws, as the latter—for the most part—are reasonably adequate to deal with organized crime activity. The laws of conspiracy have provided an effective substantive tool with which to confront the criminal groups. From a legal standpoint, organized crime continues to grow because of defects in the evidence-gathering process. Under present procedures, too few witnesses have been produced to prove the link between criminal group members and the illicit activities that they sponsor.

Grand Juries. A compulsory process is necessary to obtain essential testimony or material. This is most readily accomplished by an investigative grand jury or an alternate mechanism through which the attendance of witnesses and production of books and records can be ordered. Such grand juries must stay in session long enough to allow for the unusually long time required to build an organized crime case. The possibility of arbitrary termination of a grand jury by supervisory judges constitutes a danger to successful completion of an investigation.

The Commission recommends:

At least one investigative grand jury should be impaneled annually in each jurisdiction that has major organized crime activity.

If a grand jury shows the court that its business is unfinished at the end of a normal term, the court should extend that term a reasonable time in order to allow the grand jury to complete pending investigations. Judicial dismissal of grand juries with unfinished business should be appealable by the prosecutor and provision made for suspension of such dismissal orders during the appeal.

The automatic convening of these grand juries would force less than diligent investigators and prosecutors to explain their inaction. The grand jury should also have recourse when not satisfied with such explanations.

The Commission recommends:

The grand jury should have the statutory right of appeal to an appropriate executive official, such as an attorney general or governor, to replace local prosecutors or investigators with special counsel or special investigators appointed only in relation to matters that they or the grand jury deem appropriate for investigation.

When a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community.

Immunity. A general immunity statute as proposed in chapter 5 on the courts is essential in organized crime investigations and prosecutions. There is evidence to indicate that the availability of immunity can overcome the wall of silence that so often defeats the efforts of law enforcement to obtain live witnesses in organized crime cases. Since the activities of criminal groups involve such a broad scope of criminal violations, immunity provisions covering this breadth of illicit actions are necessary to secure the testimony of uncooperative or criminally involved witnesses. Once granted immunity from prosecution based upon their testimony, such witnesses must testify before the grand jury and at trial, or face jail for contempt of court.

Federal, State, and local coordination of immunity grants, and approval by the jurisdiction's chief law enforcement officer before immunity is granted, are crucial in organized crime investigations. Otherwise, without such coordination and approval, or through corruption of officials, one jurisdiction might grant immunity to someone about to be arrested or indicted in another jurisdiction.

The Commission recommends:

A general witness immunity statute should be enacted at Federal and State levels, providing immunity sufficiently broad to assure compulsion of testimony. Immunity should be granted only with the prior approval of the jurisdiction's chief prosecuting officer. Efforts to coordinate Federal, State, and local immunity grants should be made to prevent interference with existing investigations.

Perjury. Many prosecutors believe that the incidence of perjury is higher in organized crime cases than in routine criminal matters. Immunity can be an effective prosecutive weapon only if the immunized witness then testifies truthfully. The present special proof requirements in perjury cases, detailed in chapter 5, inhibit prosecutors from seeking perjury indictments and lead to much lower conviction rates for perjury than for other crimes. Lessening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony.

The Commission recommends:

Congress and the States should abolish the rigid two-witness and direct-evidence rules in perjury prosecutions, but retain the requirement of proving an intentional false statement.

WIRETAPPING AND EAVESDROPPING

In connection with the problems of securing evidence against organized crime, the Commission considered issues relating to electronic surveillance, including wiretapping and "bugging"—the secret installation of mechanical devices at specific locations to receive and transmit conversations.

Significance to Law Enforcement. The great majority of law enforcement officials believe that the evidence necessary to bring criminal sanctions to bear consistently on the higher echelons of organized crime will not be obtained without the aid of electronic surveillance techniques. They maintain these techniques are indispensable to develop adequate strategic intelligence concerning organized crime, to set up specific investigations, to develop witnesses, to corroborate their testimony, and to serve as substitutes for them—each a necessary step in

the evidence-gathering process in organized crime investigations and prosecutions.

As previously noted, the organizational structure and operational methods employed by organized crime have created unique problems for law enforcement. High-ranking organized crime figures are protected by layers of insulation from direct participation in criminal acts, and a rigid code of discipline inhibits the development of informants against them. A soldier in a family can complete his entire crime career without ever associating directly with his boss. Thus, he is unable, even if willing, to link the boss directly to any criminal activity in which he may have engaged for their mutual benefit. Agents and employees of an organized crime family, even when granted immunity from prosecution, cannot implicate the highest level figures, since frequently they have neither spoken to, nor even seen them.

Members of the underworld, who have legitimate reason to fear that their meetings might be bugged or their telephones tapped, have continued to meet and to make relatively free use of the telephone—for communication is essential to the operation of any business enterprise. In legitimate business this is accomplished with written and oral exchanges. In organized crime enterprises, however, the possibility of loss or seizure of an incriminating document demands a minimum of written communication. Because of the varied character of organized criminal enterprises, the large numbers of persons employed in them, and frequently the distances separating elements of the organization, the telephone remains an essential vehicle for communication. While discussions of business matters are held on a face-to-face basis whenever possible, they are never conducted in the presence of strangers. Thus, the content of these conversations, including the planning of new illegal activity, and transmission of policy decisions or operating instruc-

tions for existing enterprises, cannot be detected. The extreme scrutiny to which potential members are subjected and the necessity for them to engage in criminal activity have precluded law enforcement infiltration of organized crime groups.

District Attorney Frank S. Hogan, whose New York County office has been acknowledged for over 27 years as one of the country's most outstanding, has testified that electronic surveillance is:

the single most valuable weapon in law enforcement's fight against organized crime . . . It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures in the underworld, my own office could not have convicted Charles "Lucky" Luciano, Jimmy Hines, Louis "Lepke" Buchalter, Jacob "Gurrah" Shapiro, Joseph "Socks" Lanza, George Scalise, Frank Erickson, John "Dio" Dioguardi, and Frank Carbo . . .

Over the years New York has faced one of the Nation's most aggravated organized crime problems. Only in New York have law enforcement officials achieved some level of continuous success in bringing prosecutions against organized crime. For over 20 years, New York has authorized wiretapping on court order. Since 1957, bugging has been similarly authorized. Wiretapping was the mainstay of the New York attack against organized crime until Federal court decisions intervened. Recently chief reliance in some offices has been placed on bugging, where the information is to be used in court. Law enforcement officials believe that the successes achieved in some parts of the State are attributable primarily to a combination of dedicated and competent personnel and adequate legal tools; and that the failure to do more in New York has resulted primarily from the failure to commit additional resources of time and men. The

debilitating effect of corruption, political influence, and incompetence, underscored by the New York State Commission of Investigation, must also be noted.

In New York at one time, Court supervision of law enforcement's use of electronic surveillance was sometimes perfunctory, but the picture has changed substantially under the impact of pretrial adversary hearings on motions to suppress electronically seized evidence. Fifteen years ago there was evidence of abuse by low-rank policemen. Legislative and administrative controls, however, have apparently been successful in curtailing its incidence.

The Threat to Privacy. In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed. External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of such a society.

Today, in addition to some law enforcement agents, numerous private persons are utilizing these techniques. They are employed to acquire evidence for domestic relations cases, to carry on industrial espionage and counter-espionage, to assist in preparing for civil litigation, and for personnel investigations, among others. Technological advances have produced remarkably sophisticated devices, of which the electronic cocktail olive is illustrative, and continuing price reductions have expanded their markets. Nor has man's ingenuity in the development of surveillance equipment been exhausted with the design

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and manufacture of electronic devices for wiretapping or for eavesdropping within buildings or vehicles. Parabolic microphones that pick up conversations held in the open at distances of hundreds of feet are available commercially, and some progress has been made toward utilizing the laser beam to pick up conversations within a room by focusing upon the glass of a convenient window. Progress in microminiaturizing electronic components has resulted in the production of equipment of extremely small size. Because it can detect what is said anywhere—not just on the telephone—bugging presents especially serious threats to privacy.

Detection of surveillance devices is difficult, particularly where an installation is accomplished by a skilled agent. Isolated instances where equipment is discovered in operation therefore do not adequately reflect the volume of such activity; the effectiveness of electronic surveillance depends in part upon investigators who do not discuss their activities. The current confusion over the legality of electronic surveillance compounds the assessment problem since many agents feel their conduct may be held unlawful and are unwilling to report their activities. It is presently impossible to estimate with any accuracy the volume of electronic surveillance conducted today. The Commission is impressed, however, with the opinions of knowledgeable persons that the incidence of electronic surveillance is already substantial and increasing at a rapid rate.

Present Law and Practice. In 1928 the U. S. Supreme Court decided that evidence obtained by wiretapping a defendant's telephone at a point outside the defendant's premises was admissible in a Federal crimi al prosecution. The Court found no unconstitutional search and seizure under the Fourth Amendment. Enactment of Section 605 of the Federal Communications Act in 1934

precluded interception and disclosure of wire communications. The Department of Justice has interpreted this section to permit interception so long as no disclosure of the content outside the Department is made. Thus, wiretapping may presently be conducted by a Federal agent, but the results may not be used in court. When police officers wiretap and disclose the information obtained, in accordance with State procedure, they are in violation of Federal law.

Law enforcement experience with bugging has been much more recent and more limited than the use of the traditional wiretap. The legal situation with respect to bugging is also different. The regulation of the national telephone communication network falls within recognized national powers, while legislation attempting to authorize the placing of electronic equipment even under a warrant system would break new and uncharted ground. At the present time there is no Federal legislation explicitly dealing with bugging. Since the decision of the Supreme Court in *Silverman* v. *United States*, 365 U. S. 505 (1961), use of bugging equipment that involves an unauthorized physical entry into a constitutionally protected private area violates the Fourth Amendment, and evidence thus obtained is inadmissible. If eavesdropping is unaccompanied by such a trespass, or if the communication is recorded with the consent of one of the parties, no such prohibition applies.

The confusion that has arisen inhibits cooperation between State and Federal law enforcement agencies because of the fear that information secured in one investigation will legally pollute another. For example, in New York City prosecutors refuse to divulge the contents of wire communications intercepted pursuant to State court orders because of the Federal proscription but do utilize evidence obtained by bugging pursuant

to court order. In other sections of New York State, however, prosecutors continue to introduce both wiretapping and eavesdropping evidence at trial.

Despite the clear Federal prohibition against disclosure of wiretap information no Federal prosecutions of State officers have been undertaken, although prosecutions of State officers under State laws have occurred.

One of the most serious consequences of the present state of the law is that private parties and some law enforcement officers are invading the privacy of many citizens without control from the courts and reasonable legislative standards. While the Federal prohibition is a partial deterrent against divulgence, it has no effect on interception, and the lack of prosecutive action against violators has substantially reduced respect for the law.

The present status of the law with respect to wiretapping and bugging is intolerable. It serves the interests neither of privacy nor of law enforcement. One way or the other, the present controversy with respect to electronic surveillance must be resolved.

The Commission recommends:

Congress should enact legislation dealing specifically with wiretapping and bugging.

All members of the Commission agree on the difficulty of striking the balance between law enforcement benefits from the use of electronic surveillance and the threat to privacy its use may entail. Further, striking this balance presents important constitutional questions now pending before the U. S. Supreme Court in *People* v. *Berger,* and any congressional action should await the outcome of that case.

All members of the Commission believe that if authority to employ these techniques is granted it must be granted only with stringent limitations. One form of detailed regulatory statute that has been suggested to

the Commission is outlined in the appendix to the Commission's organized crime task force volume. All private use of electronic surveillance should be placed under rigid control, or it should be outlawed.

A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers to the extent it may be consistent with the decision of the Supreme Court in *People* v. *Berger,* and, further, that the availability of such specific authority would significantly reduce the incentive for, and the incidence of, improper electronic surveillance.

The other members of the Commission have serious doubts about the desirability of such authority and believe that without the kind of searching inquiry that would result from further congressional consideration of electronic surveillance, particularly of the problems of bugging, there is insufficient basis to strike this balance against the interests of privacy.

Matters affecting the national security not involving criminal prosecution are outside the Commission's mandate, and nothing in this discussion is intended to affect the existing powers to protect that interest.

CURTIS PUBLISHING CO. *v.* BUTTS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 37. Argued February 23, 1967.—Decided June 12, 1967.*

In No. 37, respondent brought a diversity libel action in federal court seeking compensatory and punitive damages for an article which was published in petitioner's magazine accusing respondent of conspiring to "fix" a football game between the University of Alabama and the University of Georgia, where he was privately employed as the athletic director. The article was based upon an affidavit concerning a telephone conversation between respondent and the Alabama coach which the affiant, Burnett, had accidentally overheard. Respondent challenged the truth of the article and claimed a serious departure by the magazine from good investigative standards of the accuracy of its charges amounting to reckless and wanton conduct. He submitted evidence at the trial showing, *inter alia*, that petitioner's magazine, which had instituted a policy of "sophisticated muckraking," knew that Burnett was on criminal probation but had published the story without any independent support for his affidavit; that it did not before publication view his notes (the information in which, if not valueless, would be readily available to any coach); that the magazine did not interview a person with Burnett when the phone call was overheard, view the game films, or check for any adjustments in Alabama's plans after the information was divulged; and that the magazine assigned the story to a writer not a football expert and made no effort to have such an expert check the story. The jury was instructed on the issue of truth as a defense and was also instructed that it could award punitive damages and could assess the reliability and the nature of the sources of the magazine's information and its care in checking the assertions, considerations relevant to determining whether the magazine had proceeded with "wanton and reckless indifference." The jury returned a verdict of general and punitive damages which was reduced by remittitur. The trial court rejected the defense's new trial motion based on *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (which was decided after the filing of the complaint in and trial of this case), holding that deci-

*Together with No. 150, *Associated Press* v. *Walker*, on certiorari to the Court of Civil Appeals of Texas, 2d Supreme Judicial District.

sion inapplicable to one like petitioner not a public official. It also held the evidence amply supported the conclusion that the magazine had acted in reckless disregard of whether the article was false or not. The Court of Appeals affirmed on the merits. It did not reach the constitutional claim based on *New York Times*, holding that petitioner had waived the right to make that challenge since some of its lawyers had been involved in the latter case, yet the defense was based solely on the issue of truth. In No. 150, petitioner, a news association, published a dispatch about a massive riot on the University of Mississippi campus attending federal efforts to enforce a court decree ordering a Negro's enrollment. The dispatch stated that respondent, a politically prominent figure whose statements on federal intervention had been widely publicized, had taken command of the violent crowd and led a charge against federal marshals trying to enforce the court's decree, had encouraged violence and given technical advice to the rioters. Respondent brought a libel action in the Texas state courts for compensatory and punitive damages. Petitioner's defense was based on truth and constitutional rights. The evidence showed that the dispatch had been made on the scene and almost immediately reported to the petitioner by a competent correspondent. There was no significant showing of improper preparation of the dispatch, or any prejudice by petitioner or its correspondent. The jury was instructed that compensatory damages could be awarded if the dispatch was not substantially true and that punitive damages could be added if the article was actuated by ill will or entire want of care. The jury returned a verdict for both compensatory and punitive damages. The trial court refused to enter an award for the latter. The court held *New York Times* inapplicable but that if applicable it would require a verdict for the petitioner since there was no evidence of malice. Both sides appealed. The Texas Court of Civil Appeals affirmed and the Texas Supreme Court denied review. *Held:* The judgment in No. 37 is affirmed. The judgment in No. 150 is reversed and the case remanded. Pp. 133–174.

No. 37, 351 F. 2d 702, affirmed; No. 150, 393 S. W. 2d 671, reversed and remanded.

MR. JUSTICE HARLAN, joined by MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS, concluded that:

1. Petitioner's failure in No. 37 to raise the constitutional defense before trial constituted no waiver of its right to do so after *New York Times* was decided. Pp. 142–145.

2. The *New York Times* rule prohibiting a public official from recovering damages for defamatory falsehood relating to his official conduct absent actual malice as therein defined, though necessary there to protect against prosecutions close to seditious libel for criticizing official conduct, should not be inexorably applied to defamation actions by "public figures" like those here, where different considerations are present. Pp. 148, 152–154.

3. A "public figure" who is not a public official may recover damages for defamatory falsehood substantially endangering his reputation on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. P. 155.

4. In view of the court's instructions in No. 37, the jury must have decided that the magazine's investigation was grossly inadequate, and the evidence amply supported a finding of the highly unreasonable conduct referred to above. Pp. 156–158.

5. In No. 150, where the courts found the evidence insufficient to support more than a finding of even ordinary negligence, respondent is not entitled to damages. Pp. 158–159.

6. Misconduct sufficient to justify compensatory damages also justifies punitive damages; the same constitutional standards apply to both. Pp. 159–161.

THE CHIEF JUSTICE concluded that:

1. The *New York Times* standard applies to defamation actions by "public figures" as well as those by "public officials." Pp. 162–165.

2. The judgment in No. 150, being in clear conflict with *New York Times*, must be reversed. P. 165.

3. Retrial of No. 37 is not necessary since the jury's verdict therein in view of instructions which invoked the elements later held necessary in *New York Times* most probably was based on the requirement of reckless disregard for the truth enunciated in that case. Pp. 165–167.

4. The overlapping of counsel in No. 37 with counsel in *New York Times* and in a libel action against petitioner by the Alabama coach, in which a First Amendment defense was also made, compels the conclusion that the failure to defend on those grounds here was deliberate. Pp. 167–168.

5. The evidence shows that petitioner in No. 37 acted in reckless disregard for the truth. Pp. 168–170.

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, concluded that in order to dispose of No. 150 he concurs in the grounds stated by THE CHIEF JUSTICE which are summarized in paragraphs 1 and 2, *supra*, of THE CHIEF JUSTICE's conclusions but does not recede from his previously expressed views about the much wider press and speech freedoms of the First and Fourteenth Amendments. P. 170.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, concluded that the grounds stated by THE CHIEF JUSTICE which are summarized in paragraphs 1 and 2, *supra*, of THE CHIEF JUSTICE's conclusions in No. 150 govern that case. P. 172.

Herbert Wechsler argued the cause for petitioner in No. 37. With him on the brief was *Philip H. Strubing*. *William P. Rogers* argued the cause for petitioner in No. 150. With him on the briefs were *Leo P. Larkin, Jr.*, *Stanley Godofsky*, *Arthur Moynihan* and *J. A. Gooch*.

Allen E. Lockerman and *William H. Schroder* argued the cause for respondent in No. 37. With them on the brief was *Robert S. Sams*. *Clyde J. Watts* argued the cause for respondent in No. 150. With him on the brief was *William Andress, Jr.*

Howard Ellis, Keith Masters, Don H. Reuben and *Lawrence Gunnels* filed a brief for the Tribune Company, as *amicus curiae*, urging reversal in No. 150.

MR. JUSTICE HARLAN announced the judgments of the Court and delivered an opinion in which MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS join.†

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280, this Court held that "[t]he constitutional guar-

† Five members of the Court, while concurring in the result reached in No. 150, would rest decision on grounds other than those stated in this opinion. See separate opinions of THE CHIEF JUSTICE (*post*, p. 162), of MR. JUSTICE BLACK (*post*, p. 170), and of MR. JUSTICE BRENNAN (*post*, p. 172).

antees [of freedom of speech and press] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." We brought these two cases here, 385 U. S. 811, 385 U. S. 812, to consider the impact of that decision on libel actions instituted by persons who are not public officials, but who are "public figures" and involved in issues in which the public has a justified and important interest. The sweep of the *New York Times* rule in libel actions brought under state law was a question expressly reserved in that case, 376 U. S., at 283, n. 23, and while that question has been involved in later cases, *Garrison* v. *Louisiana*, 379 U. S. 64; *Rosenblatt* v. *Baer*, 383 U. S. 75; *Time, Inc.* v. *Hill*, 385 U. S. 374, it has not been fully settled.

The matter has, however, been passed on by a considerable number of state and lower federal courts and has produced a sharp division of opinion as to whether the *New York Times* rule should apply only in actions brought by public officials or whether it has a longer reach. Compare, *e. g.*, *Pearson* v. *Fairbanks Publishing Co.*, 413 P. 2d 711 (Alaska), with *Clark* v. *Pearson*, 248 F. Supp. 188.[1]

[1] See also *Afro-American Publishing Co.* v. *Jaffe*, 125 U. S. App. D. C. 70, 366 F. 2d 649; *Washington Post Co.* v. *Keogh*, 125 U. S. App. D. C. 32, 365 F. 2d 965; *Pauling* v. *Globe-Democrat Publishing Co.*, 362 F. 2d 188; *Pape* v. *Time, Inc.*, 354 F. 2d 558; *Pauling* v. *News Syndicate Co., Inc.*, 335 F. 2d 659; *Fignole* v. *Curtis Publishing Co.*, 247 F. Supp. 595; *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231; *United Medical Labs* v. *CBS, Inc.*, 258 F. Supp. 735; *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404; *Walker* v. *Associated Press*, — Colo. —, 417 P. 2d 486; *Powell* v. *Monitor Publishing Co., Inc.*, 107 N. H. 83, 217 A. 2d 193; *Eadie* v. *Pole*, 91 N. J. Super. 504, 221 A. 2d 547; *State* v. *Browne*, 86 N. J. Super. 217, 206 A. 2d 591; *People*

The resolution of the uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the relationship between libel law and the freedom of speech and press, lest the *New York Times* rule become a talisman which gives the press constitutionally adequate protection only in a limited field, or, what would be equally unfortunate, one which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication. These two libel actions, although they arise out of quite different sets of circumstances, provide that opportunity. We think they are best treated together in one opinion.

I.

No. 37, *Curtis Publishing Co.* v. *Butts,* stems from an article published in petitioner's Saturday Evening Post which accused respondent of conspiring to "fix" a football game between the University of Georgia and the University of Alabama, played in 1962. At the time of the article, Butts was the athletic director of the University of Georgia and had overall responsibility for the administration of its athletic program. Georgia is a state university, but Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself.[2] Butts had previously served as head

v. *Mager,* 25 App. Div. 2d 363, 269 N. Y. S. 2d 848; *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823; *Krutech* v. *Schimmel,* 50 Misc. 2d 1052, 272 N. Y. S. 2d 261; *Cabin* v. *Community Newspapers, Inc.,* 50 Misc. 2d 574, 270 N. Y. S. 2d 913; *Pauling* v. *National Review,* 49 Misc. 2d 975, 269 N. Y. S. 2d 11; *Block* v. *Benton,* 44 Misc. 2d 1053, 255 N. Y. S. 2d 767; *Fegley* v. *Morthimer,* 204 Pa. Super. 54, 202 A. 2d 125; *Tucker* v. *Kilgore,* 388 S. W. 2d 112 (Ky.).

[2] In *Allen* v. *Regents of the University System of Georgia,* 304 U. S. 439, this Court described the Athletic Association as a body carrying on "a business comparable in all essentials to those usually

football coach of the University and was a well-known and respected figure in coaching ranks. He had maintained an interest in coaching and was negotiating for a position with a professional team at the time of publication.

The article was entitled "The Story of a College Football Fix" and prefaced by a note from the editors stating: "Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. . . . Before the University of Georgia played the University of Alabama . . . Wally Butts . . . gave [to its coach] . . . Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed." The text revealed that one George Burnett, an Atlanta insurance salesman, had accidentally overheard, because of electronic error, a telephone conversation between Butts and the head coach of the University of Alabama, Paul Bryant, which took place approximately one week prior to the game. Burnett was said to have listened while "Butts outlined Georgia's offensive plays . . . and told . . . how Georgia planned to defend . . . . Butts mentioned both players and plays by name." The readers were told that Burnett had made notes of the conversation, and specific examples of the divulged secrets were set out.

The article went on to discuss the game and the players' reaction to the game, concluding that "[t]he Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating," and said that the players, and other sideline observers, were aware that Alabama was privy to Georgia's secrets. It set out the series of events commencing with Burnett's later presentation of his notes to the Georgia head coach,

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conducted by private owners." *Id.*, at 451. Section 32–153 of the Georgia Code specifically provides that athletic associations are not to be considered agencies of the State.

Johnny Griffith, and culminating in Butts' resignation from the University's athletic affairs, for health and business reasons. The article's conclusion made clear its expected impact:

> "The chances are that Wally Butts will never help any football team again. . . . The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure."

Butts brought this diversity libel action in the federal courts in Georgia seeking $5,000,000 compensatory and $5,000,000 punitive damages. The complaint was filed, and the trial completed, before this Court handed down its decision in *New York Times*, and the only defense raised by petitioner Curtis was one of substantial truth. No constitutional defenses were interposed although Curtis' counsel were aware of the progress of the *New York Times* case, and although general constitutional defenses had been raised by Curtis in a libel action instituted by the Alabama coach who was a state employee.

Evidence at trial was directed both to the truth of the article and to its preparation. The latter point was put in issue by the claim for punitive damages which required a finding of "malice" under Georgia law. The evidence showed that Burnett had indeed overheard a conversation between Butts and the Alabama coach, but the content of that conversation was hotly disputed. It was Butts' contention that the conversation had been general football talk and that nothing Burnett had overheard would have been of any particular value to an opposing coach. Expert witnesses supported Butts by analyzing Burnett's notes and the films of the game itself. The Saturday Evening Post's version of the game and of the players' remarks about the game was severely contradicted.

The evidence on the preparation of the article, on which we shall focus in more detail later, cast serious doubt on the adequacy of the investigation underlying the article. It was Butts' contention that the magazine had departed greatly from the standards of good investigation and reporting and that this was especially reprehensible, amounting to reckless and wanton conduct, in light of the devastating nature of the article's assertions.

The jury was instructed that in order for the defense of truth to be sustained it was "necessary that the truth be substantially portrayed in those parts of the article which libel the plaintiff." The "sting of the libel" was said to be "the charge that the plaintiff rigged and fixed the 1962 Georgia-Alabama game by giving Coach Bryant [of Alabama] information which was calculated to or could have affected the outcome of the game." The jury was also instructed that it could award punitive damages "to deter the wrong-doer from repeating the trespass" in an amount within its sole discretion if it found that actual malice had been proved.[3]

The jury returned a verdict for $60,000 in general damages and for $3,000,000 in punitive damages. The trial court reduced the total to $460,000 by remittitur. Soon thereafter we handed down our decision in *New York Times* and Curtis immediately brought it to the attention of the trial court by a motion for new trial. The trial judge rejected Curtis' motion on two grounds. He

[3] Actual malice was defined by the charge as encompassing "the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others." The jury was told that whether "actual malice or wanton or reckless indifference has been established must be determined from all of the evidence in the case." The trial court then directed the jury's attention to the circumstances of preparation. The impact of the charge is considered in more detail at 156–158, *infra*.

first held that *New York Times* was inapplicable because Butts was not a public official. He also held that "there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."

Curtis appealed to the Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court by a two-to-one vote. The majority there did not reach the merits of petitioner's constitutional claim, holding that Curtis had "clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times," 351 F. 2d 702, 713, on the basis of *Michel* v. *Louisiana,* 350 U. S. 91. It found Curtis chargeable with knowledge of the constitutional limitations on libel law at the time it filed its pleadings below because of its "interlocking battery of able and distinguished attorneys" some of whom were involved in the *New York Times* litigation. This holding rendered the compensatory damage decision purely one of state law and no error was found in its application. Turning to the punitive damage award, the majority upheld it as stemming from the "enlightened conscience" of the jury as adjusted by the lawful action of the trial judge. It was in "complete accord" with the trial court's determination that the evidence justified the finding "that what the Post did was done with reckless disregard of whether the article was false or not." 351 F. 2d, at 719.

Judge Rives dissented, arguing that the record did not support a finding of knowing waiver of constitutional defenses. He concluded that the *New York Times* rule was applicable because Butts was involved in activities of great interest to the public. He would have reversed because "the jury might well have understood the district court's charge to allow recovery on a showing of

intent to inflict harm or even the culpably negligent infliction of harm, rather than the intent to inflict harm through falsehood . . . ." 351 F. 2d, at 723.

Rehearing was denied, 351 F. 2d, at 733, and we granted certiorari, as indicated above. For reasons given below, we would affirm.

II.

No. 150, *Associated Press* v. *Walker*, arose out of the distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University. The dispatch stated that respondent Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court's decree and to assist in preserving order. It also described Walker as encouraging rioters to use violence and giving them technical advice on combating the effects of tear gas.

Walker was a private citizen at the time of the riot and publication. He had pursued a long and honorable career in the United States Army before resigning to engage in political activity, and had, in fact, been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957. He was acutely interested in the issue of physical federal intervention, and had made a number of strong statements against such action which had received wide publicity. Walker had his own following, the "Friends of Walker," and could fairly be deemed a man of some political prominence.

Walker initiated this libel action in the state courts of Texas, seeking a total of $2,000,000 in compensatory and punitive damages. Associated Press raised both the

defense of truth and constitutional defenses. At trial both sides attempted to reconstruct the stormy events on the campus of the University of Mississippi. Walker admitted his presence on the campus and conceded that he had spoken to a group of students. He claimed, however, that he had counseled restraint and peaceful protest, and exercised no control whatever over the crowd which had rejected his plea. He denied categorically taking part in any charge against the federal marshals.

There was little evidence relating to the preparation of the news dispatch. It was clear, however, that the author of this dispatch, Van Savell, was actually present during the events described and had reported them almost immediately to the Associated Press office in Atlanta. A discrepancy was shown between an oral account given the office and a later written dispatch, but it related solely to whether Walker had spoken to the group before or after approaching the marshals. No other showing of improper preparation was attempted, nor was there any evidence of personal prejudice or incompetency on the part of Savell or the Associated Press.

The jury was instructed that an award of compensatory damages could be made if the dispatch was not substantially true,[4] and that punitive damages could be added if the article was actuated by "ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

A verdict of $500,000 compensatory damages and $300,000 punitive damages was returned. The trial judge, however, found that there was "no evidence to support the jury's answers that there was actual malice"

[4] Two particular statements were at issue, the remark that "Walker assumed command of the crowd," and the accusation that Walker led a charge against the marshals.

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and refused to enter the punitive award. He concluded that the failure further to investigate the minor discrepancy between the oral and written versions of the incident could not "be construed as that *entire want of care* which would amount to a *conscious indifference* to the rights of plaintiff. Negligence, it may have been; malice, it was not. Moreover, the mere fact that AP permitted a young reporter to cover the story of the riot is not evidence of malice." (Emphasis in original.) The trial judge also noted that this lack of "malice" would require a verdict for the Associated Press if *New York Times* were applicable. But he rejected its applicability since there were "no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense."

Both sides appealed and the Texas Court of Civil Appeals affirmed both the award of compensatory damages and the striking of punitive damages. It stated without elaboration that *New York Times* was inapplicable. As to the punitive damage award, the plea for reinstatement was refused because "[i]n view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in the light of all the evidence, we hold that appellee failed to prove malice . . . ." 393 S. W. 2d 671, 683.

The Supreme Court of Texas denied a writ of error, and we granted certiorari, as already indicated. For reasons given below, we would reverse.

III.

Before we reach the constitutional arguments put forward by the respective petitioners, we must first determine whether Curtis has waived its right to assert such arguments by failing to assert them before trial. As our dispositions of *Rosenblatt* v. *Baer*, 383 U. S. 75,

and other cases involving constitutional questions indicate,[5] the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time, *Michel* v. *Louisiana, supra,* at 99,[6] but an effective waiver must, as was said in *Johnson* v. *Zerbst,* 304 U. S. 458, 464, be one of a "known right or privilege."

Butts makes two arguments in support of his contention that Curtis' failure to raise constitutional defenses amounted to a knowing waiver. The first is that the general state of the law at the time of this trial was such that Curtis should, in the words of the Fifth Circuit majority, have seen "the handwriting on the wall." 351 F. 2d, at 734. We cannot accept this contention. Although our decision in *New York Times* did draw upon earlier precedents in state law, *e. g., Coleman* v. *MacLennan,* 78 Kan. 711, 98 P. 281, and there were intimations in a prior opinion and the extra-judicial comments of one Justice,[7] that some applications of libel law might be in conflict with the guarantees of free speech and press, there was strong precedent indicating that civil libel actions

[5] See *Tehan* v. *Shott,* 382 U. S. 406, 409, n. 3; *Linkletter* v. *Walker,* 381 U. S. 618, 622–629; *Griffin* v. *California,* 380 U. S. 609; *White* v. *Maryland,* 373 U. S. 59.

[6] See also *Ackermann* v. *United States,* 340 U. S. 193, 198.

[7] In *Beauharnais* v. *Illinois,* 343 U. S. 250, the Court had upheld an Illinois group libel statute but the majority had warned that " 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." *Id.,* at 263–264. There were also four vigorous dissenters to the holding in that case. An article appearing in the June 1962 New York University Law Review had quoted MR. JUSTICE BLACK as believing that "there should be no libel or defamation law in the United States . . . ." Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N. Y. U. L. Rev. 549, 557.

were immune from general constitutional scrutiny.[8] Given the state of the law prior to our decision in *New York Times*, we do not think it unreasonable for a lawyer trying a case of this kind, where the plaintiff was not even a public official under state law, to have looked solely to the defenses provided by state libel law. Nor do we think that the previous grant of certiorari in *New York Times* alone indicates a different conclusion. The questions presented for review there were premised on Sullivan's status as an elected public official, and elected officials traditionally have been subject to special rules of libel law.[9]

Butts' second contention is that whatever defenses might reasonably have been apparent to the average lawyer, some of Curtis' trial attorneys were involved in the *New York Times* litigation and thus should have been especially alert to constitutional contentions. This was the argument which swayed the Court of Appeals, but we do not find it convincing.

First, as a general matter, we think it inadvisable to determine whether a "right or privilege" is "known" by relying on information outside the record concerning the special legal knowledge of particular attorneys. Second, even a lawyer fully cognizant of the record and briefs in the *New York Times* litigation might reasonably have expected the resolution of that case to have no impact

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[8] In *Robertson* v. *Baldwin*, 165 U. S. 275, 281, the Court said: "Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation . . . ." That sentiment was repeated in a number of cases including *Beauharnais* v. *Illinois*, *supra*, n. 7. See *Near* v. *Minnesota*, 283 U. S. 697, 715; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

[9] See, *e. g.*, *Sweeney* v. *Patterson*, 76 U. S. App. D. C. 23, 128 F. 2d 457; *Hendrix* v. *Mobile Register*, 202 Ala. 616, 81 So. 558.

on this litigation, since the arguments advanced there depended so heavily on the analogy to seditious libel. We think that it was our eventual resolution of *New York Times*, rather than its facts and the arguments presented by counsel, which brought out the constitutional question here. We would not hold that Curtis waived a "known right" before it was aware of the *New York Times* decision. It is agreed that Curtis' presentation of the constitutional issue after our decision in *New York Times* was prompt.

Our rejection of Butts' arguments is supported by factors which point to the justice of that conclusion. See *Hormel* v. *Helvering*, 312 U. S. 552, 556–557. Curtis' constitutional points were raised early enough so that this Court has had the benefit of some ventilation of them by the courts below. The resolution of the merits of Curtis' contentions by the District Court makes it evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below.[10] Finally the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U. S. 319, 327. Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling. Cf. *New York Times Co.* v. *Connor*, 365 F. 2d 567, 572.

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[10] Even after our decision in *New York Times* was before him, the trial judge held it inapplicable. It is almost certain that he would have rebuffed any effort to interpose general constitutional defenses at the time of trial. See Comment, Waiver of a Previously Unrecognized Defense: Must Lawyers Be Seers?, 114 U. Pa. L. Rev. 451.

IV.

We thus turn to a consideration, on the merits, of the constitutional claims raised by Curtis in *Butts* and by the Associated Press in *Walker*. Powerful arguments are brought to bear for the extension of the *New York Times* rule in both cases. In *Butts* it is contended that the facts are on all fours with those of *Rosenblatt* v. *Baer, supra,* since Butts was charged with the important responsibility of managing the athletic affairs of a state university. It is argued that while the Athletic Association is financially independent from the State and Butts was not technically a state employee, as was Baer, his role in state administration was so significant that this technical distinction from *Rosenblatt* should be ignored. Even if this factor is to be given some weight, we are told that the public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular, justifies constitutional protection of discussion of persons involved in it equivalent to the protection afforded discussion of public officials.

A similar argument is raised in the *Walker* case where the important public interest in being informed about the events and personalities involved in the Mississippi riot is pressed. In that case we are also urged to recognize that Walker's claims to the protection of libel laws are limited since he thrust himself into the "vortex" of the controversy.

We are urged by the respondents, Butts and Walker, to recognize society's "pervasive and strong interest in preventing and redressing attacks upon reputation," and the "important social values which underlie the law of defamation." *Rosenblatt* v. *Baer, supra,* at 86. It is pointed out that the publicity in these instances was not directed at employees of government and that these cases cannot be analogized to seditious libel prosecutions. *Id.,* at 92 (STEWART, J., concurring). We are

told that "[t]he rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes," *Afro-American Publishing Co.* v. *Jaffe*, 125 U. S. App. D. C. 70, 81, 366 F. 2d 649, 660, and that:

> "Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . they must pay the freight; and injured persons should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand." *Buckley* v. *New York Post Corp.*, 373 F. 2d 175, 182.

We fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases, but in all libel actions arising from a publication concerning public issues. In *Time, Inc.* v. *Hill*, 385 U. S. 374, 388, we held that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . ." and affirmed that freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88, 102. This carries out the intent of the Founders who felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government. Letter to the Inhabitants of Quebec, 1 Journals of the Continental Cong. 108. From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational

distinction "cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials." *Pauling* v. *Globe-Democrat Publishing Co.*, 362 F. 2d 188, 196.

On the other hand, to take the rule found appropriate in *New York Times* to resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility, *Rosenblatt* v. *Baer*, *supra*, at 86, as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc.* v. *Hill*, *supra*, at 390, we counseled against "blind application of *New York Times Co.* v. *Sullivan*" and considered "the factors which arise in the particular context." Here we must undertake a parallel evaluation.[11]

The modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right. From the fountainhead opinions of Justices Holmes and Brandeis in *Schenck*, *Abrams*, and *Whitney*,[12] which considered the problem when the disruptive effects of speech might strip the protection from the speaker, to our recent decision in *Adderley* v. *Florida*, 385 U. S. 39, where we found freedom of speech not to include a freedom to trespass, the Court's primary concern has been to determine the extent of the right and the surrounding safeguards necessary to give it "breathing space." *NAACP* v.

[11] The majority opinion in *Time, Inc.* v. *Hill*, 385 U. S. 374, was limited to the consideration of nondefamatory matter. *Id.*, at 391.

[12] *Schenck* v. *United States*, 249 U. S. 47 (Holmes, J.); *Abrams* v. *United States*, 250 U. S. 616, 624 (Holmes, J., dissenting); *Whitney* v. *California*, 274 U. S. 357, 372 (Brandeis, J., concurring).

Button, 371 U. S. 415, 433. That concern has perhaps omitted from searching consideration the "real problem" of defining or delimiting the right itself. See Freund, Mr. Justice Black and the Judicial Function, 14 U. C. L. A. L. Rev. 467, 471.

It is significant that the guarantee of freedom of speech and press falls between the religious guarantees and the guarantee of the right to petition for redress of grievances in the text of the First Amendment, the principles of which are carried to the States by the Fourteenth Amendment. It partakes of the nature of both, for it is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community, see Holt, Of the Liberty of the Press, in Nelson, Freedom of the Press from Hamilton to the Warren Court 18–19, as it is a social necessity required for the "maintenance of our political system and an open society." *Time, Inc.* v. *Hill, supra*, at 389. It is because of the personal nature of this right that we have rejected all manner of prior restraint on publication, *Near* v. *Minnesota*, 283 U. S. 697, despite strong arguments that if the material was unprotected the time of suppression was immaterial. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640. The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an "unalienable right" that "governments are instituted among men to secure." History shows us that the Founders were not always convinced that unlimited discussion of public issues would be "for the benefit of all of us" [13] but that they firmly adhered to the proposition that the "true liberty of the press" permitted "every man to publish

[13] See Levy, Legacy of Suppression. The phrase is from the Court's opinion in *Time, Inc.* v. *Hill, supra*, at 389.

his opinion." *Respublica* v. *Oswald*, 1 Dall. 319, 325 (Pa.).

The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *Labor Board*, 301 U. S. 103, 132–133. Federal securities regulation,[14] mail fraud statutes,[15] and common-law actions for deceit and misrepresentation[16] are only some examples of our understanding that the right to communicate information of public interest is not "unconditional." See Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191. However, as our decision in *New York Times* makes explicit, while protected activity may in some respects be subjected to sanctions, it is not open to all forms of regulation. The guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . ." 2 Cooley, Constitutional Limitations 886 (8th ed.). Our touchstones are that acceptable

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[14] *E. g.*, 48 Stat. 82, as amended, 15 U. S. C. § 77k (penalizing negligent misstatement).

[15] 18 U. S. C. § 1341.

[16] See *Traylor Engineering & Mfg. Co.* v. *National Container Corp.*, 45 Del. 143, 70 A. 2d 9; Restatement, Torts § 525 (deceit); *Nash* v. *Minnesota Title Ins. & Trust Co.*, 163 Mass. 574, 40 N. E. 1039 (negligent misrepresentation).

limitations must neither affect "the impartial distribution of news" and ideas, *Associated Press* v. *Labor Board, supra,* at 133, nor because of their history or impact constitute a special burden on the press, *Grosjean* v. *American Press Co., Inc.,* 297 U. S. 233, nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values. Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions and while a proof of truth might prevent recovery in a civil action, this limitation is more readily explained as a manifestation of judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of the publication. The same truthful statement might be the basis of a criminal libel action. See *Commonwealth* v. *Clap,* 4 Mass. 163; see generally Veeder, The History and Theory of the Law of Defamation, 3 Col. L. Rev. 546, 4 Col. L. Rev. 33.

The law of libel has, of course, changed substantially since the early days of the Republic, and this change is "the direct consequence of the friction between it . . . and the highly cherished right of free speech." *State* v. *Browne,* 86 N. J. Super. 217, 228, 206 A. 2d 591, 597. The emphasis has shifted from criminal to civil remedies, from the protection of absolute social values to the safeguarding of valid personal interests. Truth has become an absolute defense in almost all cases,[17] and privileges designed to foster free communication are almost uni-

[17] See 1 Harper & James, The Law of Torts § 5.20.

versally recognized.[18] But the basic theory of libel has not changed, and words defamatory of another are still placed "in the same class with the use of explosives or the keeping of dangerous animals." Prosser, The Law of Torts § 108, at 792. Thus some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.

While the truth of the underlying facts might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm and thus resolve the antithesis on a neutral ground, we have rejected, in prior cases involving materials and persons commanding justified and important public interest, the argument that a finding of falsity alone should strip protections from the publisher. *New York Times Co.* v. *Sullivan, supra,* at 272. We have recognized "the inevitability of some errror in the situation presented in free debate," *Time, Inc.* v. *Hill, supra,* at 406 (opinion of this writer), and that "putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship."

Our resolution of *New York Times Co.* v. *Sullivan,* in the context of the numerous statutes and cases which allow ideologically neutral, and generally applicable regulatory measures to be applied to publication, makes clear, however, that neither the interests of the publisher nor those of society necessarily preclude a damage award

[18] Some privileges such as the one pertaining to reports of judicial proceedings are recognized as absolute. Others, such as the fair-comment privilege are recognized only as conditional privileges and may be vitiated by proof of actual malice. See generally Prosser, The Law of Torts §§ 109, 110.

based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.

In *New York Times* we were adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability. The plaintiff in that case was an official whose position in government was such "that the public [had] an independent interest in the qualifications and performance of the person who [held] it." *Rosenblatt* v. *Baer, supra,* at 86. Such officials usually enjoy a privilege against libel actions for their utterances, see, *e. g., Barr* v. *Matteo,* 360 U. S. 564, and there were analogous considerations involved in *New York Times, supra,* at 282. Thus we invoked "the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies," *Dennis* v. *United States,* 341 U. S. 494, 503, and limited recovery to those cases where "calculated falsehood" placed the publisher "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison* v. *Louisiana,* 379 U. S. 64, 75. That is to say, such officials were permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone were held insufficient to satisfy this standard. See *New York*

Times, at 286–288, 292; *Garrison* v. *Louisiana*, *supra*, at 73–75, 79.

In the cases we decide today none of the particular considerations involved in *New York Times* is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel. We are prompted, therefore, to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules, a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to a judicial shifting of loss. In defining these rules, and especially in formulating the standards for determining the degree of care to be expected in the circumstances, courts have consistently given much attention to the importance of defendants' activities. Prosser, The Law of Torts § 31, at 151. The courts have also, especially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense. See *Brewer* v. *Hearst Publishing Co.*, 185 F. 2d 846; *Flanagan* v. *Nicholson Publishing Co.*, 137 La. 588, 68 So. 964. We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times*. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. See *Spahn* v. *Julian Messner, Inc.*, 18 N. Y. 2d 324, 221 N. E. 2d 543, re-

manded on other grounds, 387 U. S. 239. Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. *Whitney* v. *California,* 274 U. S. 357, 377 (Brandeis, J., dissenting).

These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. Cf. Sulzberger, Responsibility and Freedom, in Nelson, Freedom of the Press from Hamilton to the Warren Court 409, 412.

Nothing in this opinion is meant to affect the holdings in *New York Times* and its progeny, including our recent decision in *Time, Inc.* v. *Hill.*[19]

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[19] Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures or matters of public interest.

V.

Having set forth the standard by which we believe the constitutionality of the damage awards in these cases must be judged, we turn now, as the Court did in *New York Times*, to the question whether the evidence and findings below meet that standard. We find the standard satisfied in No. 37, *Butts*, and not satisfied by either the evidence or the findings in No. 150, *Walker*.

The *Butts* jury was instructed, in considering punitive damages, to assess "the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions." These considerations were said to be relevant to a determination whether defendant had proceeded with "wanton and reckless indifference." In this light we consider that the jury must have decided that the investigation undertaken by the Saturday Evening Post, upon which much evidence and argument was centered,[20] was grossly inadequate in the circumstances. The impact of a jury instruction "is not to be ascertained by

[20] Counsel for Butts continually pressed upon the jury in argument that the defendant had failed to exercise a minimum of care. He did not seriously contend that the Saturday Evening Post was actuated by pre-existing animosity toward Butts. Arguing that the misquotations which were shown to be present were proof of malice he stated: "I say that is not fair journalism; I say that is not true, careful reporting." After reviewing the failure of Curtis to interview Carmichael (see p. 157, *infra*) or to check the game films, he asked the jury: "Again, is that good reporting? Is that what the field or the profession of journalism owes you and owes me . . . when it is getting ready to write an article which it knows and which it states therein that it is going to ruin us . . . ." The gist of Butts' contention on "actual malice" was that Curtis had been anxious to publish an exposé and had thus wantonly and recklessly seized on a questionable affidavit from Burnett. It is this theory which we feel that the jury must have accepted in awarding punitive damages.

merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied." *Seaboard Air Line R. Co.* v. *Padgett*, 236 U. S. 668, 672.

This jury finding was found to be supported by the evidence by the trial judge and the majority in the Fifth Circuit. Given the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of "truth," [21] or on the very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude toward Butts rather than on Curtis' conduct.

The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael who was supposed to have been with Burnett when the phone call was overheard was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.

[21] It is inconceivable that the jury might have treated the "investigatory" evidence differently if it had been presented with respect to compensatory damages rather than with regard to punitive damages.

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The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking," and the pressure to produce a successful exposé might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

The situation in *Walker* is considerably different. There the trial court found the evidence insufficient to support more than a finding of even ordinary negligence and the Court of Civil Appeals supported the trial court's view of the evidence. Ordinarily we would, under the governing constitutional standard, reverse the decision below on the concurrent findings rule. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. But, as in *New York Times*, we think it better to face for ourselves the question whether there is sufficient evidence to support the finding we would require.

In contrast to the *Butts* article, the dispatch which concerns us in *Walker* was news which required immediate dissemination. The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. His dispatches in this in-

stance, with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy.[22] Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards. We therefore conclude that General Walker should not be entitled to damages from the Associated Press.

VI.

We come finally to Curtis' contention that whether or not it can be required to compensate Butts for any injury it may have caused him, it cannot be subjected to an assessment for punitive damages limited only by the "enlightened conscience" of the community. Curtis recognizes that the Constitution presents no general bar to the assessment of punitive damages in a civil case, *Day* v. *Woodworth*, 13 How. 363, 370–371, but contends that an unlimited punitive award against a magazine publisher constitutes an effective prior restraint by giving the jury the power to destroy the publisher's business. We cannot accept this reasoning. Publishers like Curtis engage in a wide variety of activities which may

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[22] On September 26, 1962, Walker had made a statement on radio station KWKH at Shreveport, Louisiana, urging people to "[r]ise to a stand beside Governor Ross Barnett at Jackson, Mississippi." He contended that the people had "talked, listened and been pushed around far too much . . . ." He promised that he would "be there," on "the right side." The next morning in a television appearance in Dallas he repeated the same sentiments, and he set out his views once again from New Orleans on the evening of September 28, 1962. On September 29, 1962, Walker arrived in Jackson, Mississippi, and held another press and television conference in which he called for "violent vocal protest." On the afternoon of September 30, 1962, Walker held a final press conference at which he again urged defiance of court orders and federal power.

lead to tort suits where punitive damages are a possibility. To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee. *Associated Press* v. *Labor Board,* 301 U. S. 103. We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted. See, *e. g., Minneapolis, St. P. & S. S. M. R. Co.* v. *Moquin,* 283 U. S. 520, 521.

Despite this conclusion, it might be argued that an award of punitive damages cannot be justified constitutionally by the same degree of misconduct required to support a compensatory award. The usual rule in libel actions, and other state-created tort actions, is that a higher degree of fault is necessary to sustain a punitive imposition than a compensatory award. And it might be asserted that the need to compensate the injured plaintiff is not relevant to the issue of punitive damages in libel since an award of general damages compensates for any possible pecuniary and intangible harm. Thus the argument would be that the strong speech and press interest in publishing material on public issues, which we have recognized as parallel to the interest in publishing political criticism present in *New York Times,* must be served by a limitation on punitive damages restricting them to cases of "actual malice" as defined in *New York Times* and *Garrison* v. *Louisiana, supra.* We find the force of any such argument quite insufficient to overcome the compelling contrary considerations, and there is, moreover, nothing in any of our past cases which suggests that compensatory and punitive damages are subject to different constitutional standards of misconduct.

Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse. Moreover, punitive damages require a finding of "ill will" under general libel law and it is not unjust that a publisher be forced to pay for the "venting of his spleen" in a manner which does not meet even the minimum standards required for constitutional protection. Especially in those cases where circumstances outside the publication itself reduce its impact sufficiently to make a compensatory imposition an inordinately light burden, punitive damages serve a wholly legitimate purpose in the protection of individual reputation. We would hold, therefore, that misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury. As we have already noted (*supra*, pp. 156–158) the case on punitive damages was put to the jury under instructions which satisfied the constitutional test we would apply in cases of this kind, and the evidence amply supported the jury's findings.[23]

The judgment of the Court of Appeals for the Fifth Circuit in No. 37 is affirmed. The judgment of the

[23] It should also be noted that prior to publication the Saturday Evening Post had been notified both by Butts and his daughter that the material about to be printed was false. Despite these warnings, and the fact that no member of the staff had ever even seen Burnett's crucial notes, no further efforts at investigation were undertaken prior to publication. It might indeed be argued that this conduct would have sufficed, under proper instructions, to satisfy even the "actual malice" standard of *New York Times*, the notice to the Saturday Evening Post being considered as furnishing the necessary "mental element." *New York Times*, *supra*, at 287.

Texas Court of Civil Appeals in No. 150 is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinions that have been filed herein by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BRENNAN.

It is so ordered.

MR. CHIEF JUSTICE WARREN, concurring in the result.

While I agree with the results announced by MR. JUSTICE HARLAN in both of these cases, I find myself in disagreement with his stated reasons for reaching those results. Our difference stems from his departure from the teaching of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), to which we both subscribed only three years ago.

I.

In the *New York Times* case, we held that a State cannot, consistently with the First and Fourteenth Amendments, award damages to a "public official" for a defamatory falsehood relating to his official conduct unless the verdict is based on proof of "actual malice"—that is, proof that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S., at 280. The present cases involve not "public officials," but "public figures" whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of "public officials" with respect to the same issues and events.

All of us agree that the basic considerations underlying the First Amendment require that some limitations be placed on the application of state libel laws to "public figures" as well as "public officials." Similarly, the seven members of the Court who deem it necessary to pass upon the question agree that the respondents in these cases are "public figures" for First Amendment purposes.

Having reached this point, however, MR. JUSTICE HARLAN's opinion departs from the standard of *New York Times* and substitutes in cases involving "public figures" a standard that is based on "highly unreasonable conduct" and is phrased in terms of "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" (*ante*, p. 155). I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment.

To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in

the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

I therefore adhere to the *New York Times* standard in the case of "public figures" as well as "public officials." It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation. Its definition of "actual malice" is not so restrictive that recovery is limited to situations where there is "knowing falsehood" on the part of the publisher of false and defamatory matter. "Reckless disregard" for the truth or falsity, measured by the conduct of the publisher, will also expose him to liability for publishing false material which is injurious to reputation. More significantly, however, the *New York Times* standard is an important safeguard for the rights of the

press and public to inform and be informed on matters of legitimate interest. Evenly applied to cases involving "public men"—whether they be "public officials" or "public figures"—it will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.

II.

I have no difficulty in concluding that No. 150, *Associated Press* v. *Walker,* must be reversed since it is in clear conflict with *New York Times.* The constitutional defenses were properly raised and preserved by the petitioner. The trial judge expressly ruled that no showing of malice in any sense had been made, and he reversed an award of punitive damages for that reason. The seven members of this Court who reach the question agree with that conclusion, and all agree that the courts below erred in holding the First Amendment inapplicable. Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest.

III.

But No. 37, *Curtis Publishing Co.* v. *Butts,* presents an entirely different situation. There, no First Amendment defenses were raised by the petitioner until after the trial. Because of this failure and because the case was tried before our decision in *New York Times,* the trial judge did not instruct the jury in terms of the precise formulation we adopted. In connection with the issue of punitive damages, however, the trial judge did give an "actual malice" instruction which invoked the elements we later held necessary in *New York Times.* He instructed the jury that it would have to find "actual malice" before awarding punitive damages, and he continued by defining "actual malice" as denoting "wanton or reckless indifference or culpable negligence with re-

gard to the rights of others" and as including notions of "ill will, spite, hatred and an intent to injure one." Under the Georgia law of defamation which governed the case, the jury was also specifically required to find that the defamatory statements were false before it could award any damages, and it was so instructed. With the jury's attention thus focused on this threshold requirement of falsity, the references in the instructions to wanton or reckless indifference and *culpable* negligence most probably resulted in a verdict based on the requirement of reckless disregard for the truth of which we spoke in *New York Times*.[1] Although the "actual malice" instructions were not also given in connection with the compensatory damage issue, it is difficult to conceive how petitioner could have been prejudiced by that failure in view of the fact that the jury, guided by "actual malice" instructions, awarded $3,000,000 in punitive damages.[2]

Unquestionably, in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established. We should not, how-

[1] We held unconstitutional in *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), a criminal defamation statute which authorized conviction on proof that a defamatory statement had been motivated by ill will. The statute did not require that the defamatory statement be false to sustain such a conviction.

[2] In the *New York Times* case, "actual malice" instructions were given in connection with punitive damages. However, we noted: "While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is 'presumed'. Such a presumption is inconsistent with the federal rule. . . . Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. *Because of this uncertainty,* the judgment must be reversed and the case remanded." 376 U. S., at 283–284. (Emphasis added.)

The jury in the present case was required to separate compensatory and punitive damages.

ever, be so inflexible in judging cases tried prior thereto, especially when, as here, the trial judge—unaided by advice or objections from counsel—recognized the essential principle and conformed with it to a substantial degree. Moreover, after the *New York Times* rule was brought to the trial judge's attention in a post-trial motion, he reviewed the record in light of that precise standard and held that the jury verdict should not be disturbed since "there was ample evidence from which a jury could have concluded that there was reckless disregard by the [petitioner] of whether the article was false or not."

An additional factor leads me to the conclusion that we should not insist on the financial and emotional expenses of a retrial here merely because the trial judge's instructions were not given in the precise terms of the present constitutional standard.[3] That factor, to which I briefly adverted above, was the choice of the petitioner in this case to raise only truth as a defense and to omit in its pleadings and at the trial any reference to possible First Amendment defenses or even to the conditional privilege provided by Georgia law for "[c]omments upon the acts of public men in their public capacity and with reference thereto."[4] I use the word "choice" in this

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[3] Cf. *Time, Inc.* v. *Hill*, 385 U. S. 374, 411 (1967) (dissenting opinion of MR. JUSTICE FORTAS).

[4] Ga. Code Ann. § 105–709 (6) provides:

"Privileged communications.—The following are deemed privileged communications:

. . . . . .

"6. Comments upon the acts of public men in their public capacity and with reference thereto."

This privilege is qualified by Ga. Code Ann. § 105–710, which provides:

"Malicious use of privilege.—In every case of privileged communications, if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed shall have a right of action."

connection, because the facts lead me, as they did the Court of Appeals, to the firm conclusion that the omissions were deliberate. Although this trial occurred before our decision in *New York Times*, we had granted certiorari to review that case even before the complaint here was filed.[5] The Alabama law firm which had represented the New York Times in the state courts was involved in the trial of this case. Lead counsel in the cases conferred periodically, and one of the members of the Alabama law firm referred to above sat at the counsel table throughout this trial. The same Alabama law firm was retained to represent petitioner in a lawsuit filed by Coach Paul Bryant, who was also libeled by the magazine article here in question. First Amendment defenses were raised both at the trial of the *New York Times* case and by the pleadings in the Bryant lawsuit which was settled for a substantial sum of money. But counsel did not raise such defenses here. Given the importance of this case to petitioner and the interplay between overlapping counsel aligned on the same sides of related lawsuits, I can only conclude that tactical or public relations considerations explain the failure here to defend on First Amendment grounds.

IV.

Satisfied, as I am, that under the circumstances of the *Butts* case no retrial should be ordered merely because of the instructions, I turn now to the final duty which this Court has when violations of fundamental constitu-

[5] Certiorari was granted in *New York Times Co.* v. *Sullivan* on January 7, 1963. 371 U. S. 946. The complaint in this case was filed approximately 2½ months later, on March 25, 1963. Counsel here could not have anticipated the precise standard we announced in *New York Times*. In the Bryant lawsuit and, of course, in the *New York Times* case itself, counsel did, however, raise general First Amendment defenses. No reference whatever to the First Amendment was made by defense counsel in the trial of this case.

tional principles are alleged. We must review the evidence to ascertain whether the judgment can stand consistently with those principles. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285 (1964); *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958).

The petitioner in this case is a major factor in the publishing business. Among its publications is the Saturday Evening Post which published the defamatory falsehoods here in question. Apparently because of declining advertising revenues, an editorial decision was made to "change the image" of the Saturday Evening Post with the hope that circulation and advertising revenues would thereby be increased. The starting point for this change of image was an announcement that the magazine would embark upon a program of "sophisticated muckraking," [6] designed to "provoke people, make them mad."

Shortly thereafter, and as an apparent implementation of the new policy, the Saturday Evening Post purchased the rights to the article which formed the subject matter of this case. The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of MR. JUSTICE HARLAN. Suffice it to say that little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account

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[6] Webster's New International Dictionary (2d ed., unabr.), p. 1606, reports the source of the term "muckrake" as follows:

"On April 14, 1906, President Roosevelt delivered a speech in which he used the term *muckrake* in attacking the practice of making sweeping and unjust charges of corruption against public men and corporations . . . ."

Roget's International Thesaurus § 934 (3) lists the following as synonyms: muckrake, throw mud at, throw or fling dirt at, drag through the mud and bespatter.

to be published was absolutely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article. This knowledge was signaled by the statements at the conclusion of the article that "Wally Butts will never help any football team again" and "careers will be ruined, that is sure."

I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in *New York Times* and *Garrison*. Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring in the result in No. 150, and dissenting in No. 37.

I concur in reversal of the judgment in No. 150, *Associated Press* v. *Walker*, based on the grounds and reasons stated in Parts I and II of THE CHIEF JUSTICE'S opinion. I do this, however, as in *Time, Inc.* v. *Hill*, 385 U. S. 374, 398, "in order for the Court to be able at this time to agree on [a disposition of] this important case based on the prevailing constitutional doctrine expressed in *New York Times Co.* v. *Sullivan*, 376 U. S. 254. [THE CHIEF JUSTICE'S] . . . opinion [would decide] the case in accordance with this doctrine, to which the majority adhere. In agreeing to . . . [that] opinion, I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation. See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S., at 293 (concurring opinion); *Rosenblatt* v. *Baer*, 383 U. S. 75, 94 (concurring and dissenting opinion)."

I would reverse the judgment in No. 37 for the reasons given in my concurring opinion in *New York Times Co.* v.

Sullivan, 376 U. S. 254, 293, and my concurring and dissenting opinion in *Rosenblatt* v. *Baer,* 383 U. S. 75, 94, but wish to add a few words.

These cases illustrate, I think, the accuracy of my prior predictions that the *New York Times* constitutional rule concerning libel is wholly inadequate to save the press from being destroyed by libel judgments. Here the Court reverses the case of *Associated Press* v. *Walker,* but affirms the judgment of *Curtis Publishing Co.* v. *Butts.* The main reason for this quite contradictory action, so far as I can determine, is that the Court looks at the facts in both cases as though it were a jury and reaches the conclusion that the Saturday Evening Post, in writing about Butts, was so abusive that its article is more of a libel at the constitutional level than is the one by the Associated Press. That seems a strange way to erect a constitutional standard for libel cases. If this precedent is followed, it means that we must in all libel cases hereafter weigh the facts and hold that all papers and magazines guilty of gross writing or reporting are constitutionally liable, while they are not if the quality of the reporting is approved by a majority of us. In the final analysis, what we do in these circumstances is to review the factual questions in cases decided by juries—a review which is a flat violation of the Seventh Amendment.

It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings. Today the Court will not give the First Amendment its natural and obvious meaning by holding that a law which seriously menaces the very life of press freedom violates the First Amendment. In fact, the Court is suggesting various experimental expedients in libel cases,

all of which boil down to a determination of how offensive to this Court a particular libel judgment may be, either because of its immense size or because the Court does not like the way an alleged libelee was treated. Again I suggest (see *Time, Inc.* v. *Hill*, 385 U. S. 374, 399) that we are rapidly but surely getting ourselves in the dilemma we found ourselves in when we were compelled to overrule the ill-starred case of *Betts* v. *Brady*, 316 U. S. 455,* in order that the state courts of the country might be able to determine with some degree of certainty when an indigent person was entitled to the benefit of a lawyer and avoid the spawning of hundreds of habeas corpus cases that finally raised questions that a lawyer could and would have raised at the trial.

I think it is time for this Court to abandon *New York Times Co.* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE joins, concurring in the result in No. 150, and dissenting in No. 37.

I join Parts I and II of the opinion of THE CHIEF JUSTICE and the disposition in No. 150, *Associated Press* v. *Walker*.

In No. 37, *Curtis Publishing Co.* v. *Butts*, insofar as THE CHIEF JUSTICE's opinion demonstrates that the evidence unmistakably would support a judgment for Butts under the *New York Times* standard, I agree. I would, however, remand for a new trial since the charge to the jury did not comport with that standard.[1] The charge on compensatory damages directed that the jury find

Gideon v. *Wainwright*, 372 U. S. 335.

[1] For the reasons expressed in the opinion of MR. JUSTICE HARLAN I agree that petitioner did not waive his contentions under *New York Times*.

liability on a finding of mere falsehood. And the trial court stated that punitive damages might be awarded on a finding of "actual malice" which it defined to encompass "the notion of ill will, spite, hatred and an intent to injure one," and also to denote "a wanton or reckless indifference or culpable negligence with regard to the rights of others." The court detailed some factors the jury could consider in applying this standard. It said, for example, that "[a] publication may be so extravagant in its denunciation and so vituperative in its character as to justify an inference of malice," and that "proof that the plaintiff did demand a retraction but that the defendant failed to retract the article may be considered by you on the question of punitive damages." But "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison* v. *Louisiana*, 379 U. S. 64, 73. The "good motives" of the publisher can be no more relevant in the context of "public men" than in the context of criticism of "public officials." See *Garrison, supra*. The court added that the Post could show *in mitigation* of punitive damages that "it in good faith relied upon certain matters which had come to its attention." This makes crystal clear that the standard announced authorized the jury to award punitive damages even though it found that the Post had in good faith relied on matters which had come to its attention. The charge undoubtedly fails to comport with *New York Times*.[2]

[2] The statement by the trial court that "[m]alice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" could reasonably have been regarded by the jury to relate not to the truth or falsity of the matter, but to the

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That the evidence might support a verdict under *New York Times* cannot justify our taking from the jury the function of determining, under proper instructions, whether the *New York Times* standard has been met. The extent of this Court's role in reviewing the facts, in a case such as this, is to ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284–292; *Time, Inc.* v. *Hill*, 385 U. S. 374, 391–394. When, as in this case, such evidence appears, the proper disposition in this federal case is to reverse and remand with direction for a new trial. See *Time, Inc.* v. *Hill*, *supra*.

Post's attitude toward Butts' reputation, akin to the spite and ill will in which terms the court had just defined "malice." See *Time, Inc.* v. *Hill*, 385 U. S. 374, 396, n. 12.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* ALLIS-CHALMERS MANUFACTURING CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 216. Argued March 15, 1967.—Decided June 12, 1967.

Lawful economic strikes were called at two of respondent Allis-Chalmers' plants in accordance with duly authorized union procedures by the locals of the union representing the employees. Some union members crossed picket lines and worked during the strikes. After the strikes were over the locals brought proceedings against these members, imposed fines of $20 to $100, and sued in state courts to collect the fines. The collective bargaining agreement contained a union security clause which required each employee to become and remain "a member of the union to the extent of paying his monthly dues." Allis-Chalmers filed unfair labor practice charges against the locals alleging violation of § 8 (b) (1) (A) of the National Labor Relations Act. The NLRB held that even if the union action were restraint or coercion proscribed by that section, the conduct came within the proviso that the section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The Court of Appeals reversed, holding that the union conduct violated § 8 (b) (1) (A). *Held:*

1. The history of legislative action surrounding § 8 (b) (1) (A)'s prohibition of union activity to "restrain or coerce" employees in the exercise of rights guaranteed by § 7 justifies the conclusion, in light of the imprecision of the words "restrain or coerce," and the repeated refrain throughout the debates that Congress did not propose limitations on the internal affairs of unions, that Congress did not intend § 8 (b) (1) (A) to prohibit the imposition of reasonable fines on full union members who decline to honor an authorized strike or to prohibit attempts to collect such fines. Pp. 178–195.

2. Since Allis-Chalmers offered no evidence that the fined employees enjoyed other than full union membership, the contrary will not be presumed. The question of the applicability of the statute to employees whose membership was limited to the obligation to pay monthly dues is not presented here. Pp. 196–197.

358 F. 2d 656, reversed.

Solicitor General Marshall argued the cause for petitioner. With him on the brief were *Robert S. Rifkind, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come*. *John Silard* argued the cause for respondent International Union, UAW–AFL–CIO (Locals 248 and 401), on behalf of the petitioner. With him on the brief were *Joseph L. Rauh, Jr., Stephen I. Schlossberg* and *Harriett R. Taylor*.

Howard C. Equitz argued the cause for respondent Allis-Chalmers Manufacturing Co. With him on the brief were *Maxwell H. Herriott, James A. Urdan, John L. Waddleton, Edward L. Welch* and *William J. McGowan*.

Martin C. Seham argued the cause and filed a brief for the New York Times Display Advertising Salesmen Steering Committee, as *amicus curiae*, urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether a union which threatened and imposed fines, and brought suit for their collection, against members who crossed the union's picket line and went to work during an authorized strike against their employer, committed the unfair labor practice under § 8 (b)(1)(A) of the National Labor Relations Act of engaging in conduct "to restrain or coerce" employees in the exercise of their right guaranteed by § 7 to "refrain from" concerted activities.[1]

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[1] The relevant provisions of §§ 7 and 8 (b)(1)(A), 61 Stat. 140, 141, 29 U. S. C. §§ 157 and 158 (b)(1)(A), are

"SEC. 7. Employees shall have the right to . . . engage in . . . concerted activities . . . , and shall also have the right to refrain from any or all of such activities . . . ."

"SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall

Employees at the West Allis, and La Crosse, Wisconsin, plants of respondent Allis-Chalmers Manufacturing Company were represented by locals of the United Automobile Workers. Lawful economic strikes were conducted at both plants in support of new contract demands. In compliance with the UAW constitution, the strikes were called with the approval of the International Union after at least two-thirds of the members of each local voted by secret ballot to strike. Some members of each local crossed the picket lines and worked during the strikes. After the strikes were over, the locals brought proceedings against these members charging them with violation of the International constitution and bylaws. The charges were heard by local trial committees in proceedings at which the charged members were represented by counsel. No claim of unfairness in the proceedings is made. The trials resulted in each charged member being found guilty of "conduct unbecoming a Union member" and being fined in a sum from $20 to $100. Some of the fined members did not pay the fines and one of the locals obtained a judgment in the amount of the fine against one of its members, Benjamin Natzke, in a test suit brought in the Milwaukee County Court. An appeal from the judgment is pending in the Wisconsin Supreme Court.

Allis-Chalmers filed unfair labor practice charges against the locals alleging violation of § 8 (b)(1)(A).[2]

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not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ."

[2] Two locals were involved, Local 248 at the West Allis plant, and Local 401 at the La Crosse plant. Although Allis-Chalmers' charges of unfair labor practices mentioned threats of fines as well as imposition of fines, the only proof that fines were specifically threatened during a strike consisted of a letter to strikebreaking West Allis members of Local 248 in 1959. As to the 1962 strike at West Allis and both the 1959 and 1962 strikes at La Crosse, men-

A complaint issued and after hearing a trial examiner recommended its dismissal. The National Labor Relations Board sustained the examiner on the ground that, in the circumstances of this case, the actions of the locals, even if restraint or coercion prohibited by § 8 (b)(1)(A), constituted conduct excepted from the section's prohibitions by the proviso that such prohibitions "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 149 N. L. R. B. 67. Upon Allis-Chalmers' petition for review to the Court of Appeals for the Seventh Circuit, a panel of that court upheld the Board's decision. Following a rehearing *en banc*, however, the court, three judges dissenting, withdrew the panel opinion, held that the locals' conduct violated § 8 (b)(1)(A), and remanded to the Board for appropriate proceedings. 358 F. 2d 656. We granted certiorari, 385 U. S. 810. We reverse.

I.

The panel and the majority *en banc* of the Court of Appeals thought that reversal of the NLRB order would be required under a literal reading of §§ 7 and 8 (b)(1)(A); under that reading union members who cross their own picket lines would be regarded as exercising their rights under § 7 to refrain from engaging in a particular concerted activity, and union discipline in the form of fines for such activity would therefore "restrain or coerce" in violation of § 8 (b)(1)(A) if the section's proviso is read to sanction no form of discipline other

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tion of fines first occurred after the strikes were over. The threat of court enforcement of the fines was first made in 1960 in letters sent to fined members of Local 248 who had not paid their fines; the letter informed them of the outcome of a Wisconsin Supreme Court opinion holding fines enforceable, *UAW, Local 756* v. *Woychik*, 5 Wis. 2d 528, 93 N. W. 2d 336 (1958). Local 401's test suit was brought after the 1962 strike.

than expulsion from the union. The panel rejected that literal reading. The majority *en banc* adopted it, stating that the panel "mistakenly took the position that such a literal reading was unwarranted in the light of the history and purposes" of the sections, 358 F. 2d, at 659, and holding that "[t]he statutes in question present no ambiguities whatsoever, and therefore do not require recourse to legislative history for clarification." *Id.*, at 660.

It is highly unrealistic to regard § 8 (b)(1), and particularly its words "restrain or coerce," as precisely and unambiguously covering the union conduct involved in this case. On its face court enforcement of fines imposed on members for violation of membership obligations is no more conduct to "restrain or coerce" satisfaction of such obligations than court enforcement of penalties imposed on citizens for violation of their obligations as citizens to pay income taxes, or court awards of damages against a contracting party for nonperformance of a contractual obligation voluntarily undertaken. But even if the inherent imprecision of the words "restrain or coerce" may be overlooked, recourse to legislative history to determine the sense in which Congress used the words is not foreclosed. We have only this Term again admonished that labor legislation is peculiarly the product of legislative compromise of strongly held views, *Local 1976, Carpenters' Union* v. *Labor Board*, 357 U. S. 93, 99–100, and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question. *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612, 619–620. Indeed, we have applied that principle to the construction of § 8 (b)(1)(A) itself in holding that the section must be construed in light of the fact that it "is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of

the Congress to fashion a coherent national labor policy." *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 292.

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment,[3] and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term,[4] and his right to refuse to cross a lawful picket line.[5] The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionably at the center of our federal labor policy." [6] "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338.

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[3] See *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332; *Medo Photo Supply Corp.* v. *Labor Board*, 321 U. S. 678; *ILGWU* v. *Labor Board*, 366 U. S. 731, 737.

[4] See *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 280.

[5] See *Labor Board* v. *Rockaway News Co.*, 345 U. S. 71.

[6] Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1333 (1958).

It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation. That duty "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca* v. *Sipes*, 386 U. S. 171, 182. For the same reason Congress in the 1959 Landrum-Griffin amendments, 73 Stat. 519, enacted a code of fairness to assure democratic conduct of union affairs by provisions guaranteeing free speech and assembly, equal rights to vote in elections, to attend meetings, and to participate in the deliberations and voting upon the business conducted at the meetings.

Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.[7] That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ."[8] Provisions in

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[7] See, *e. g.*, Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951); Philip Taft, The Structure and Government of Labor Unions 117–180 (1954); Taylor, The Role of Unions in a Democratic Society, Selected Readings on Government Regulation of Internal Union Affairs Affecting the Rights of Members, prepared for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare 17 (Committee Print, 85th Cong., 2d Sess., 1958) (hereafter Selected Readings); Kerr, Unions and Union Leaders of Their Own Choosing, Selected Readings, *supra*, at 106, 109.

[8] Summers, *supra*, n. 7, at 1049.

"Strikebreaking is uniformly considered sufficient reason for expulsion whether or not there is an express prohibition, for it undercuts the union's principal weapon and defeats the economic objective for

union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.[9]

In addition, the judicial view current at the time § 8 (b)(1)(A) was passed was that provisions defining punishable conduct and the procedures for trial and appeal constituted part of the contract between member and union and that "The courts' role is but to enforce the contract." [10] In *Machinists* v. *Gonzales*, 356 U. S. 617, 618, we recognized that "[t]his contractual conception of the relation between a member and his union widely prevails in this country . . . ." Although state courts were reluctant to intervene in internal union affairs, a body of law establishing standards of fairness in the enforcement of union discipline grew up around this con-

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which the union exists." Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 495 (1950).

[9] National Industrial Conference Board, The Union, The Leader, and The Members, Selected Readings, at 40, 69–71; Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 508–512 (1950); Disciplinary Powers and Procedures in Union Constitutions, U. S. Dept. of Labor Bulletin No. 1350, Bur. Lab. Statistics (1963).

It is suggested that while such provisions for fines and expulsion were a common element of union constitutions at the time of the enactment of § 8 (b)(1), such background loses its cogency here because such provisions did not explicitly call for court enforcement. However the potentiality of resort to courts for enforcement is implicit in any binding obligation. Surely it cannot be said that the absence of a "court enforceability" clause in a contract of sale implies that the parties do not foresee resort to the courts as a possible means of enforcement. It is also suggested that court enforcement of fines is "a rather recent innovation." Yet such enforcement was known as early as 1867. *Master Stevedores' Assn.* v. *Walsh*, 2 Daly 1 (N. Y.).

[10] Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L. J. 175, 180 (1960).

tract doctrine. See *Parks* v. *Electrical Workers,* 314 F. 2d 886, 902–903.[11]

To say that Congress meant in 1947 by the § 7 amendments and § 8 (b)(1)(A) to strip unions of the power to fine members for strikebreaking, however lawful the strike vote, and however fair the disciplinary procedures and penalty, is to say that Congress preceded the Landrum-Griffin amendments with an even more pervasive regulation of the internal affairs of unions. It is also to attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort "to fashion a coherent labor policy" and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon. It is no answer that the proviso to § 8 (b)(1)(A) preserves to the union the power to expel the offending member. Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine. Where the union is weak, and membership therefore of little value, the union faced with further depletion of its ranks may have no real choice except to condone the member's disobedience.[12]

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[11] See generally Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930); Note, Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1963); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 835–836 (1960).

[12] "Since the union's effectiveness is based largely on the degree to which it controls the available labor, expulsions tend to weaken the union. If large numbers are expelled, they become a threat to union standards by undercutting union rates, and in case of a strike they may act as strikebreakers. . . . Therefore, expulsions must

Yet it is just such weak unions for which the power to execute union decisions taken for the benefit of all employees is most critical to effective discharge of its statutory function.

Congressional meaning is of course ordinarily to be discerned in the words Congress uses. But when the literal application of the imprecise words "restrain or coerce" Congress employed in § 8 (b)(1)(A) produces the extraordinary results we have mentioned we should determine whether this meaning is confirmed in the legislative history of the section.

II.

The explicit wording of § 8 (b)(2), which is concerned with union powers to affect a member's employment, is in sharp contrast with the imprecise words of § 8 (b)(1)(A). Section 8 (b)(2) limits union power to compel an employer to discharge a terminated member other than for "failure [of the employee] to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." It is significant that Congress expressly disclaimed in this connection any intention to interfere with union self-government or to regulate a union's internal affairs. The Senate Report stated:

> "The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and *do not require*

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be limited to very small numbers unless the union is so strongly entrenched that it cannot be effectively challenged by the employer or another union." Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 487–488 (1950).

> *the employer to inquire into the internal affairs of the union.*" S. Rep. No. 105, 80th Cong., 1st Sess., 20, I Legislative History of the Labor Management Relations Act, 1947 (hereafter Leg. Hist.) 426. (Emphasis supplied.)

Senator Taft, in answer to protestations by Senator Pepper that § 8 (b)(2) would intervene in the union's internal affairs and "deny it the right to protect itself against a man in the union who betrays the objectives of the union . . . ," stated:

> "*The pending measure does not propose any limitation with respect to the internal affairs of unions.* They still will be able to fire any members they wish to fire, *and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion." [13] (Emphasis supplied.)

Section 8 (b)(1)(A) was under consideration when Senator Taft said this. Congressional emphasis that § 8 (b)(2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8 (b)(1)(A) as contemplating regulation of internal discipline. This is borne out by the fact that provision was also made in the Taft-Hartley Act for a special committee to study, among other things, "the internal organization and administration of labor unions . . . ." § 402 (3), 61 Stat. 160.

What legislative materials there are dealing with § 8 (b)(1)(A) contain not a single word referring to the

[13] 93 Cong. Rec. 4193, II Leg. Hist. 1097.

application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions.

The provision was not contained in the Senate or House bills reported out of committee, but was introduced as an amendment on the Senate floor by Senator Ball. The amendment was adopted in the Conference Committee, without significant enlightenment from the report of that committee. The first suggestion that restraint or coercion of employees in the exercise of § 7 rights should be an unfair labor practice appears in the Statement of Supplemental Views to the Senate Report, in which a minority of the Senate Committee, including Senators Ball, Taft, and Smith, concurred. The mischief against which the Statement inveighed was restraint and coercion by unions in *organizational campaigns*. "The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence." S. Rep. No. 105, *supra*, at 50, I Leg. Hist. 456. Senator Ball proposed § 8 (b)(1)(A) as an amendment to the Senate bill, and stated, "The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the unions also shall be guilty of unfair labor practices." 93 Cong. Rec. 4016, II Leg. Hist. 1018. Senator Ball gave numerous examples of the kind of union conduct the amendment was to cover. Each one related to union conduct during organizational cam-

paigns.[14] Senator Ball reiterated this purpose several times thereafter,[15] including remarks added after passage of the amendment.[16] The consistent thrust of his arguments was the necessity of controlling union conduct in organizational campaigns. Indeed, when Senator Holland introduced the proviso eliminating from the reach of § 8 (b)(1)(A) "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership . . . ," Senator Ball replied,

> "I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. *It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions.*" [17] (Emphasis supplied.)

After acceptance of the proviso, and on the same day as the vote on the amendment itself, Senator Ball said of the proviso: "That modification is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees." [18]

Another co-sponsor of the amendment, Senator Smith, echoed this purpose: "The pending measure is designed

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[14] 93 Cong. Rec. 4016–4017, II Leg. Hist. 1018–1021. Examples were given in debate of threats by unions to double the dues of employees who waited until later to join. It is suggested that this is no less within the ambit of internal union affairs than the fines imposed in the present case. But the significant distinction is that the cited examples necessarily concern threats against nonmembers designed to coerce them into joining, and are therefore further evidence of the primary concern of Congress with organizational tactics.

[15] 93 Cong. Rec. 4271, 4432, 4434, II Leg. Hist. 1139, 1199, 1203.

[16] 93 Cong. Rec. A–2252, II Leg. Hist. 1524–1525.

[17] 93 Cong. Rec. 4272, II Leg. Hist. 1141.

[18] 93 Cong. Rec. 4433, II Leg. Hist. 1200.

to protect employees in their freedom to decide whether or not they desire to join labor organizations, to prevent them from being restrained or coerced." [19]

Senator Taft also initially confined his comments on the amendment to examples of organizational tactics.[20] However, in debate with Senator Pepper, he suggested a broader but still limited application:

> "If there is anything clear in the development of labor union history in the past 10 years it is that more and more labor union employees have come to be subject to the orders of labor union leaders. The bill provides for the right to protest against *arbitrary powers which have been exercised by some of the labor union leaders.*" [21] (Emphasis supplied.)

In reply to Senator Pepper's protest that union members can protect themselves against such "tyranny," Senator Taft stated, "I think it is fair to say that in the case of many of the unions, the employee has a good deal more of an opportunity to select his employer than he has to select his labor-union leader." [22] Senator Taft further observed that union leaders sometimes penalize those who vote against them. Senator Pepper then attempted to draw an analogy between union members and shareholders in a corporation, to which Senator Taft replied, "The Congress has gone much further in protecting the rights of minority stockholders in corporations than it has in protecting the rights of members of unions. *Even*

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[19] 93 Cong. Rec. 4435, II Leg. Hist. 1204.

[20] 93 Cong. Rec. 4021–4022, II Leg. Hist. 1025–1027.

[21] 93 Cong. Rec. 4023, II Leg. Hist. 1028.

See Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483: "It is significant that among the major changes made in the Wagner Act by the Labor Management Relations Act of 1947 was the addition of sections purported to be aimed at protecting individual union members against undemocratic and corrupt leaders."

[22] 93 Cong. Rec. 4023, II Leg. Hist. 1028.

in this bill we do not tell the unions how they shall vote or how they shall conduct their affairs . . . ." [23] (Emphasis supplied.) Senator Pepper attempted twice to clarify the effect of the amendment on internal affairs, but Senator Taft answered only that the amendment applied to nonunion men as well.[24]

It was one week after this debate between Senator Taft and Senator Pepper that § 8 (b)(1)(A) was adopted by the Senate as an amendment to the bill. There was no further reference in the debates to the applicability of the section to internal union affairs, by Senator Taft or anyone else, despite the repeated statements by Senator Ball that it bore no relationship to the conduct of such affairs. At one point, Senator Saltonstall asked Senator Taft to provide examples of the kind of union conduct covered by the section. Senator Taft responded with examples of threats of bodily harm, economic coercion, and mass picketing in organizational campaigns and coercion which prevented employees not involved in a labor dispute from going to work.[25] But any inference

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[23] 93 Cong. Rec. 4024, II Leg. Hist. 1030. It was in the context of the quoted limiting statements that, in answer to Senator Ives' suggestion that the matter of union coercion should be further investigated, Senator Taft made the broad remark that "[m]erely to require that unions be subject to the same rules that govern employers, and that they do not have the right to interfere with or coerce employees, either their own members or those outside their union, is such a clear matter, and seems to me so easy to determine, that I would hope we would all agree." 93 Cong. Rec. 4025, II Leg. Hist. 1032.

[24] 93 Cong. Rec. 4023, 4024, II Leg. Hist. 1029, 1030. It is this colloquy to which the dissent apparently refers in its statement that in answer to Senator Pepper's charge that the amendment protected workers against their own leaders, "Senator Taft did not deny it." It may be more accurate to say that Senator Taft evaded the issue.

[25] 93 Cong. Rec. 4435–4436, II Leg. Hist. 1205–1206. The following statement of Senator Taft had no reference to the conduct of a union *vis-à-vis* a member who crossed the union's picket line but

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that Senator Taft envisioned that § 8 (b)(1)(A) intruded into and regulated internal union affairs is negated by his categorical statements to the contrary in the contemporaneous debates on § 8 (b)(2).

It is true that there are references in the Senate debate on § 8 (b)(1)(A) to an intent to impose the same prohibitions on unions that applied to employers as regards restraint and coercion of employees in their exercise of § 7 rights.[26] However apposite this parallel might be when applied to organizational tactics, it clearly is in-

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referred to union conduct in preventing employees not in the bargaining unit from going to work—"mass picketing, which absolutely prevents all the office force from going into the office of a plant."

"The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, 'Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' As I see it, that is the effect of the amendment." 93 Cong. Rec. 4436, II Leg. Hist. 1206.

His statements in a colloquy with Senator Morse were made in the same context. 93 Cong. Rec. 4436, II Leg. Hist. 1207. We read his "Supplementary Analysis of Labor Bill as Passed" as also referring to coercion of nonmembers of the striking bargaining unit. 93 Cong. Rec. 6859, II Leg. Hist. 1623. That he distinguished members from nonmembers also appears from his statement concerning the section that "[i]ts application to *labor organizations* may have a slightly different implication, but it seems to me perfectly clear that from the point of view of the *employee* the two cases are parallel." 93 Cong. Rec. 4023, II Leg. Hist. 1028. (Emphasis supplied.)

It is not true that "the sponsors of the section repeatedly announced that it would protect union members from their leaders." Only Senator Taft's statements provide limited support for the proposition.

[26] S. Rep. No. 105, 80th Cong., 1st Sess., 50, I Leg. Hist. 456; 93 Cong. Rec. 4025, 4436, II Leg. Hist. 1032, 1207.

applicable to the relationship of a union member to his own union. Union membership allows the member a part in choosing the very course of action to which he refuses to adhere, but he has of course no role in employer conduct, and nonunion employees have no voice in the affairs of the union.[27]

Cogent support for an interpretation of the body of § 8 (b)(1) as not reaching the imposition of fines and attempts at court enforcement is the proviso to § 8 (b)(1). It states that nothing in the section shall "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." Senator Holland offered the proviso during debate and Senator Ball immediately accepted it, stating that it was not the intent of the sponsors in any way to regulate the internal affairs of unions.[28] At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than

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[27] Cf. statement of Justice Stone in *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 184–185, n. 2:

"State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. [Citations omitted.]

"Underlying the stated rule has been the thought, often expressed in judicial opinion, that *when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.*" (Emphasis supplied.)

A commentator has noted that "the ballot in a free election is the individual union member's weapon for inducing performance in accordance with his desire." Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1329 (1958).

[28] 93 Cong. Rec. 4272, 4433, II Leg. Hist. 1141, 1200.

expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment. Therefore, under the proviso the rule in the UAW constitution governing fines is valid and the fines themselves and expulsion for nonpayment would not be an unfair labor practice. Assuming that the proviso cannot also be read to authorize court enforcement of fines, a question we need not reach,[29] the fact remains that to interpret the body of § 8 (b)(1) to apply to the imposition and collection of fines would be to impute to Congress a concern with the permissible *means* of enforcement of union fines and to attribute to Congress a narrow and discrete interest in banning court enforcement of such fines. Yet there is not one word in the legislative history evidencing any such congressional concern. And, as we have pointed out, a distinction between court enforcement and expulsion would have been anomalous for several reasons. First, Congress was operating within the context of the "contract theory" of the union-member relationship which widely prevailed at that time. The efficacy of a contract is precisely its legal enforceability. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled. Second, as we have noted, such a distinction would visit upon the member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of the weak union by requiring it either to condone misconduct or deplete its ranks.

There may be concern that court enforcement may permit the collection of unreasonably large fines.[30] How-

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[29] Our conclusion that § 8 (b)(1)(A) does not prohibit the locals' actions makes it unnecessary to pass on the Board holding that the proviso protected such actions.

[30] The notification by Local 248 to its strikebreaking employees that each day they continued to work might constitute a separate

ever, even were there evidence that Congress shared this concern,[31] this would not justify reading the Act also to bar court enforcement of reasonable fines.[32]

The 1959 Landrum-Griffin amendments, thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs,[33] also negate the reach

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offense punishable by a fine of $100 was sent only to members of Local 248, not those of Local 401, and only during one of the two strikes called by Local 248. The notification was sent only to those employees who had already decided to work during the strike. Most important, no inference can be drawn from that notification that court enforcement would be the means of collection. Therefore, at least under the proviso, if not the body of § 8 (b) (1), such notification would not be an unfair labor practice. It is not argued that the fines for which court enforcement was actually sought were unreasonably large.

[31] Senator Wiley's reference in a speech after § 8 (b) (1) was passed to $20,000 fines for crossing a picket line was not directed to the section. 93 Cong. Rec. 5000, II Leg. Hist. 1471.

[32] It has been noted that the state courts, in reviewing the imposition of union discipline, find ways to strike down "discipline [which] involves a severe hardship." Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1078 (1951).

It is suggested that reading § 8 (b) (1) to allow court enforcement of fines adds a "new weapon to the union's economic arsenal," and is inconsistent with the mood of Congress to curtail the powers of unions. The question here, however, is not whether Congress gave to unions a new power, but whether it eliminated, without debate, a power which the unions already possessed.

[33] In 1958, in *Machinists* v. *Gonzales*, 356 U. S. 617, 620, we said:

"[T]he protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied."

See Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852:

"The act is the first major step in the regulation of the internal affairs of labor unions. It expands the national labor policy into the area of relations between the employees and the labor union. Previously national policy was confined to relationships between management and union."

given § 8 (b)(1)(A) by the majority *en banc* below. "To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit." *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 291–292. In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline. Even then, some Senators emphasized that "in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents." S. Rep. No. 187, 86th Cong., 1st Sess., 7. The Eighty-sixth Congress was thus plainly of the view that union self-government was not regulated in 1947. Indeed, that Congress expressly recognized that a union member may be "fined, suspended, expelled, or otherwise disciplined," and enacted only procedural requirements to be observed. 73 Stat. 523, 29 U. S. C. § 411 (a)(5). Moreover, Congress added a proviso to the guarantee of freedom of speech and assembly disclaiming any intent "to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . . ." 29 U. S. C. § 411 (a)(2).

The 1959 provisions are significant for still another reason. We have seen that the only indication in the debates over § 8 (b)(1)(A) of a reach beyond organizational tactics which restrain or coerce nonmembers was Senator Taft's concern with arbitrary and undemocratic

union leadership. The 1959 amendments are addressed to that concern. The kind of regulation of internal union affairs which Senator Taft said protected stockholders of a corporation, and made necessary a "right of protest against arbitrary powers which have been exercised by some of the labor union leaders," [34] is embodied in the 1959 Act. The requirements of adherence to democratic principles, fair procedures and freedom of speech apply to the election of union officials and extend into all aspects of union affairs.[35] In the present case the procedures followed for calling the strikes and disciplining the recalcitrant members fully comported with these requirements, and were in every way fair and democratic. Whether § 8 (b)(1)(A) proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader, are matters not presented by this case, and upon which we express no view.

Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more justified in light of the repeated refrain throughout the debates on § 8 (b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.

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[34] 93 Cong. Rec. 4023, II Leg. Hist. 1028.

[35] 29 U. S. C. §§ 411–415, 431 (c), 461–464, 481–482. Significantly, the Landrum-Griffin amendments expressly rendered it unlawful for any union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled . . ." under that Act. 29 U. S. C. § 529.

III.

The collective bargaining agreements with the locals incorporate union security clauses. Full union membership is not compelled by the clauses: an employee is required only to become and remain "a member of the Union . . . to the extent of paying his monthly dues . . . ." The majority *en banc* below nevertheless regarded full membership to be "the result not of individual voluntary choice but of the insertion of [this] union security provision in the contract under which a substantial minority of the employees may have been forced into membership." 358 F. 2d, at 660. But the relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed his union's picket line. It is clear that the fined employees involved herein enjoyed full union membership. Each executed the pledge of allegiance to the UAW constitution and took the oath of full membership. Moreover, the record of the Milwaukee County Court case against Benjamin Natzke discloses that two disciplined employees testified that they had fully participated in the proceedings leading to the strike. They attended the meetings at which the secret strike vote and the renewed strike vote were taken. It was upon this and similar evidence that the Milwaukee County Court found that Natzke "had by his actions become a member of the union for all purposes . . . ." Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary. Cf. *Machinists* v. *Street*, 367 U. S. 740, 774.[36] Indeed, it

[36] In *Machinists* v. *Street*, we held that employees who were members of a union under a union security agreement authorized by the

is and has been Allis-Chalmers' position that the Taft-Hartley prohibitions apply whatever the nature of the membership. Whether those prohibitions would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view.[37]

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE WHITE, concurring.

It is true that § 8 (b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce any employees in the exercise of § 7 rights, but the proviso permits the union to make its own rules with respect to acquisition and retention of membership. Hence, a union may expel to enforce its own internal rules, even though a particular rule limits the § 7 rights of its members and

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Railway Labor Act, had a right to relief against a union using their dues payments for political purposes. We said, at 774:

"Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of [the Act] . . . were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee. . . . Thus we think that only those who have identified themselves as opposed to political uses of their funds are entitled to relief in this action."

[37] Under § 8 (a)(3) the extent of an employee's obligation under a union security agreement is "expressly limited to the payment of initiation fees and monthly dues. . . . 'Membership' as a condition of employment is whittled down to its financial core." *Labor Board* v. *General Motors Corp.*, 373 U. S. 734, 742.

Not before us is the question of the extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law. Compare *Machinists* v. *Gonzales*, 356 U. S. 617; *Plumbers' Union* v. *Borden*, 373 U. S. 690.

even though expulsion to enforce it would be a clear and serious brand of "coercion" imposed in derogation of those § 7 rights. Such restraint and coercion Congress permitted by adding the proviso to § 8 (b)(1)(A). Thus, neither the majority nor the dissent in this case questions the validity of the union rule against its members crossing picket lines during a properly called strike, or the propriety of expulsion to enforce the rule. Section 8 (b)(1)(A), therefore, does not bar *all* restraint and coercion by a union to prevent the exercise by its members of their § 7 rights. "Coercive" union rules are enforceable at least by expulsion.

The dissenting opinion in this case, although not questioning the enforceability of coercive rules by expulsion from membership, questions whether fines for violating such rules are enforceable at all, by expulsion or otherwise. The dissent would at least hold court collection of fines to be an unfair labor practice, apparently for the reason that fines collectible in court may be more coercive than fines enforceable by expulsion. My Brother BRENNAN, for the Court, takes a different view, reasoning that since expulsion would in many cases—certainly in this one involving a strong union—be a far more coercive technique for enforcing a union rule and for collecting a reasonable fine than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of § 7 rights, nevertheless intended to bar enforcement by another method which may be far less coercive.

I do not mean to indicate, and I do not read the majority opinion otherwise, that every conceivable internal union rule which impinges upon the § 7 rights of union members is valid and enforceable by expulsion and court action. There may well be some internal union rules which on their face are wholly invalid and unenforceable.

But the Court seems unanimous in upholding the rule against crossing picket lines during a strike and its enforceability by expulsion from membership. On this premise I think the opinion written for the Court is the more persuasive and sensible construction of the statute and I therefore join it, although I am doubtful about the implications of some of its generalized statements.

MR. JUSTICE BLACK, whom MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART join, dissenting.

The United Automobile Workers went on a lawful economic strike against the Allis-Chalmers Manufacturing Co. Some union members, refusing to engage in the concerted strike activities, crossed the picket lines and continued to work for Allis-Chalmers. The right to refrain from engaging in such "concerted activities" is guaranteed all employees by the language of § 7 of the National Labor Relations Act, as amended, 61 Stat. 140, and § 8 (b)(1)(A) of the Act, 61 Stat. 141, makes it an unfair labor practice for a union to "restrain or coerce" employees in their exercise of their § 7 rights. Despite these emphatic guarantees of the Act, the union filed charges against the employees and imposed fines against those who had crossed its picket lines to go back to work. Though the proviso to § 8 (b)(1)(A) preserves the union's "right . . . to prescribe its own rules with respect to the . . . retention of membership therein," the union did not attempt to exercise its right under the proviso to expel the disciplined members when they refused to pay the fines. Instead, it brought legal proceedings in state courts to compel the payment of the fines. The Court now affirms the Labor Board's action in refusing to find the union guilty of an unfair labor practice under § 8 (b)(1)(A) for fining its members because they

crossed its picket lines. I cannot agree and, therefore, would affirm the judgment of the Court of Appeals which set aside the Labor Board's order.

I.

In determining what the Court here holds, it is helpful to note what it does not hold. Since the union resorted to the courts to enforce its fines instead of relying on its own internal sanctions such as expulsion from membership, the Court correctly assumes that the proviso to § 8 (b)(1)(A) cannot be read to authorize its holding. Neither does the Court attempt to sustain its holding by reference to § 7 which gives employees the right to refrain from engaging in concerted activities. To be sure, the Court in characterizing the union-member relationship as "contractual" and in emphasizing that its holding is limited to situations where the employee is a "full member" of the union, implies that by joining a union an employee gives up or waives some of his § 7 rights. But the Court does not say that a union member is without the § 7 right to refrain from participating in such concerted activity as an economic strike called by his union. Such a holding would be clearly unwarranted even by resort to the legislative history of the 1947 addition to § 7 of "the right to refrain from any or all of such activities." According to Senator Taft, that phrase was added by the Conference Committee to "make the prohibition contained in section 8 (b)(1) apply to coercive acts of unions against employees who did not wish to join *or did not care to participate in a strike or a picket line.*" 93 Cong. Rec. 6859, II Leg. Hist. 1623. (Emphasis added.)

With no reliance on the proviso to § 8 (b)(1)(A) or on the meaning of § 7, the Court's holding boils down to this: a court-enforced reasonable fine for nonparticipation in a strike does not "restrain or coerce" an employee in the

exercise of his right not to participate in the strike. In holding as it does, the Court interprets the words "restrain or coerce" in a way directly opposed to their literal meaning, for the Court admits that fines are as coercive as penalties imposed on citizens for the nonpayment of taxes. Though Senator Taft, in answer to charges that these words were ambiguous, said their meaning "is perfectly clear," 93 Cong. Rec. 4021, II Leg. Hist. 1025, and though any union official with sufficient intelligence and learning to be chosen as such could hardly fail to comprehend the meaning of these plain, simple English words, the Court insists on finding an "inherent imprecision" in these words. And that characterization then allows the Court to resort to "[w]hat legislative materials there are." In doing so, the Court finds three significant things: (1) there is "not a single word" to indicate that § 8 (b)(1)(A) was intended to apply to "traditional internal union discipline in general, or disciplinary fines in particular"; (2) the "repeated refrain" running through the debates on the section was that Congress did not intend to impose any limitations on the "internal affairs of unions"; (3) the Senators who supported the section were primarily concerned with union coercion during organizational drives and with union violence in general.

Even were I to agree with the Court's three observations about the legislative history of § 8 (b)(1)(A), I do not think they alone justify disregarding the plain meaning of the section, and it seems perfectly clear to me that the Court does not think so either. The real reason for the Court's decision is its policy judgment that unions, especially weak ones, need the power to impose fines on strikebreakers and to enforce those fines in court. It is not enough, says the Court, that the unions have the power to expel those members who refuse to participate in a strike or who fail to pay fines imposed on them for such

failure to participate; it is essential that weak unions have the choice between expulsion and court-enforced fines, simply because the latter are more effective in the sense of being more punitive. Though the entire mood of Congress in 1947 was to curtail the power of unions, as it had previously curtailed the power of employers, in order to equalize the power of the two, the Court is unwilling to believe that Congress intended to impair "the usefulness of labor's cherished strike weapon." [1] I cannot agree with this conclusion or subscribe to the Court's unarticulated premise that the Court has power to add a new weapon to the union's economic arsenal whenever the Court believes that the union needs that weapon. That is a job for Congress, not this Court.

II.

Though the Court recognizes that a union fine is in fact coercive, it seeks support for its holding—that court-enforced fines are not prohibited by § 8 (b)(1)(A)—by reference to the proviso which authorizes a union to prescribe its own rules with respect to the retention of membership. The Court first assumes that the proviso protects the union's right to expel members for the express purpose of discouraging them from going to work. From that assumption the Court then suggests that "[a]t the very least . . . the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion,

[1] Those members of the Senate who opposed § 8 (b)(1)(A) shared the Court's concern that it would impair the effectiveness of strikes. To that concern, Senator Taft replied:

"I can see nothing in the pending measure which . . . would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way . . . . All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." 93 Cong. Rec. 4436, II Leg. Hist. 1207.

and to impose fines which carry the . . . threat of expulsion for nonpayment." And finally, departing a third step further from the literal language of the proviso, the Court arrives at its holding that Congress could not have meant to preclude unions from the alternative of judicially enforcing fines.

Contrary to the Court, I am not at all certain that a union's right under the proviso to prescribe rules for the retention of membership includes the right to restrain a member from working by trying him on the vague charge of "conduct unbecoming a union member" and fining him for exercising his § 7 right of refusing to participate in a strike, even though the fine is only enforceable by expulsion from membership. It is one thing to say that Congress did not wish to interfere with the union's power, similar to that of any other kind of voluntary association, to prescribe specific conditions of membership. It is quite another thing to say that Congress intended to leave unions free to exercise a court-like power to try and punish members with a direct economic sanction for exercising their right to work. Just because a union might be free, under the proviso, to expel a member for crossing a picket line does not mean that Congress left unions free to threaten their members with fines. Even though a member may later discover that the threatened fine is only enforceable by expulsion, and in that sense a "lesser penalty," the direct threat of a fine, to a member normally unaware of the method the union might resort to for compelling its payment, would often be more coercive than a threat of expulsion.

Even on the assumption that § 8 (b)(1)(A) permits a union to fine a member as long as the fine is only enforceable by expulsion, the fundamental error of the Court's opinion is its failure to recognize the practical and theoretical difference between a court-enforced fine, as here, and a fine enforced by expulsion or less drastic

intra-union means.[2] As the Court recognizes, expulsion for nonpayment of a fine may, especially in the case of a strong union, be more severe than judicial collection of the fine. But, if the union membership has little value and if the fine is great, then court-enforcement of the fine may be more effective punishment, and that is precisely why the Court desires to provide weak unions with this alternative to expulsion, an alternative which is similar to a criminal court's power to imprison defendants who fail to pay fines.

In this case, each strikebreaking employee was fined from $20 to $100, and the union initiated a "test case" in state court to collect the fines. In notifying the employees of the charges against them, however, the union warned them that each day they crossed the picket line and went to work might be considered a separate offense punishable by a fine of $100. In several of the cases, the strikes lasted for many months. Thus, although the union here imposed minimal fines for the purpose of its "test case," it is not too difficult to imagine a case where the fines will be so large that the threat of their imposition will absolutely restrain employees from going to work during a strike. Although an employee might be willing to work even if it meant the loss of union membership, he would have to be well paid indeed to work at the risk that he would have to pay his union $100 a day for each day worked. Of course, as the Court suggests, he might be able to defeat the union's attempt at judicial enforcement of the fine by showing it was "unreasonable" or that he was not a "full member" of the union, but few employees would have the courage or the financial means to be willing to take that risk. Cf. *Ex parte Young*, 209 U. S. 123.

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[2] See generally Comment, 115 U. Pa. L. Rev. 47 (1966); 80 Harv. L. Rev. 683 (1967).

The Court disposes of this tremendous practical difference between court-enforced and union-enforced fines by suggesting that Congress was not concerned with "the permissible *means* of enforcement of union fines" and that court-enforcement of fines is a necessary consequence of the "contract theory" of the union-member relationship. And then the Court cautions that its holding may only apply to court enforcement of "reasonable fines." Apparently the Court believes that these considerations somehow bring reasonable court-enforced fines within the ambit of "internal union affairs." There is no basis either historically or logically for this conclusion or the considerations upon which it is based. First, the Court says that disciplinary fines were commonplace at the time the Taft-Hartley Act was passed, and thus Congress could not have meant to prohibit these "traditional internal union discipline" measures without saying so. Yet there is not one word in the authorities cited by the Court that indicates that court enforcement of fines was commonplace or traditional in 1947, and, to the contrary, until recently unions rarely resorted to court enforcement of union fines.[3] Second, Congress' unfamiliarity in 1947 with this recent innovation and consequent failure to make any distinction between union-enforced and court-enforced fines cannot support the conclusion that Congress was unconcerned with the "means" a union uses to enforce its fines. Congress was expressly concerned with enacting "rules of the game" for unions to abide by. 93 Cong. Rec. 4436, II Leg. Hist. 1206. As noted by the Labor Board the year after § 8 (b)(1)(A)

[3] These authorities are cited at n. 9 of the Court's opinion. One of them notes that the union's "discipline power has its own practical limitations" simply because the union's ultimate sanction at that time was limited to expulsion. Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 487 (1950). That practical limitation is today removed by the Court's holding.

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was passed, "[i]n that Section, Congress was aiming at means, not at ends." *Perry Norvell Co.*, 80 N. L. R. B. 225, 239. At the very least Congress intended to preclude a union's use of certain means to collect fines. It is clear, as the Court recognizes, that Congress in enacting § 8 (b)(2) was concerned with insulating an employee's job from his union membership. If the union here had attempted to enforce the payment of the fines by persuading the employer to discharge the nonpaying employees or to withhold the fines from their wages, it would have clearly been guilty of an unfair labor practice under § 8(b)(2).[4] If the union here, operating under a union shop contract, had applied the employees' dues to the satisfaction of the fines and then charged them extra dues, that, under Board decisions, would have been a violation of § 8 (b)(1)(A), since it would have jeopardized the employees' jobs.[5] Yet here the union has resorted to equally effective outside assistance to enforce the payment of its fines, and the Court holds that within the ambit of "internal union discipline." I have already pointed to the impact that $100 per day court-enforced fines may have on an employee's job—they would totally discourage him from working at all—and I fail to see how court enforcement of union fines is any more "internal" than employer enforcement. The undeniable fact is that the union resorts to outside help when it is not strong enough to enforce obedience internally. And even if the union does not resort to outside help but uses threats of physical violence by its officers or other members to compel payment of its fines,

[4] See, *e. g.*, *NLRB* v. *Bell Aircraft Corp.*, 206 F. 2d 235 (collective bargaining agreement between employer and union provided that employer could not promote employee who had disciplinary charges pending against him by union).

[5] See, *e. g.*, *Associated Home Builders of Greater Green Bay*, 145 N. L. R. B. 1775, remanded on other grounds, 352 F. 2d 745.

I do not doubt that this too would be a violation of § 8 (b)(1)(A).

Finally, the Court attempts to justify court-enforcement of fines by comparing it to judicial enforcement of the provisions of an ordinary commercial contract—a comparison which, according to the Court's own authority, is simply "a legal fabrication."[6] The contractual theory of union membership, at least until recently, was a fiction used by the courts to justify judicial intervention in union affairs to protect employees, not to help unions. I cannot believe that Congress intended the effectiveness of § 8 (b)(1)(A) to be impaired by such a fiction,[7] or that it was content to rely on the state courts' use of this fiction to protect members from union coercion.[8] Particularly is that so where the "contract" between the union and the employee is the involuntary

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[6] "The contract of membership is . . . a legal fabrication . . . . What are the terms of the contract? The constitutional provisions, particularly those governing discipline, are so notoriously vague that they fall far short of the certainty ordinarily required of a contract. The member has no choice as to terms but is compelled to adhere to the inflexible ones presented. Even then, the union is not bound, for it retains the unlimited power to amend any term at any time. . . . In short, membership is a special relationship. It is as far removed from the main channel of contract law as the relationships created by marriage . . . ."

Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1055–1056 (1951).

[7] Although the Court states that Congress was operating within the context of the "contract theory," I have been unable to find any reference to this theory in the legislative history, even by the opponents to curtailing union power. When Senator Pepper suggested that the section should not apply to union members because they elect their own leaders, Senator Taft rejected that premise as a frequent fiction. See p. 210, *infra*.

[8] Congress was, indeed, primarily concerned with the kind of coercion state courts were unable to cope with. 93 Cong. Rec. 4016, 4024, II Leg. Hist. 1018, 1031.

product of a union shop. Although the Court of Appeals held that to be the case here, the Court takes the surprising position that "what motivated" the full union member to make the "contract" is immaterial. I doubt that even an ordinary commercial contract is enforceable against a party who entered into it involuntarily. But I am certain that Congress did not intend to insulate union coercion from the literal language of § 8 (b)(1)(A) merely because the union has secured a "full" but involuntary contract from those it desires to coerce.

III.

While the Court may be correct in saying that resort to legislative history is proper here, it is certainly not justified in ignoring the plain meaning of § 8 (b)(1)(A) on the basis of the inconclusive legislative history it points to. In the first place, "[w]hat legislative materials there are dealing with § 8 (b)(1)(A)" are only the remarks of a few Senators during the debate on the floor. The section was added on the floor after the bill had cleared the Senate Committee. There were no debates on the section in the House, there were no committee reports on the section, and debate in the Senate was brief. In the second place, though the Court deems the words "restrain or coerce" to be "imprecise," it somehow is willing to attribute a magical quality of clarity to the refrain "internal affairs of unions." The Court is thus willing to attribute more certainty and careful consideration to a refrain used by several Senators in a heated debate in response to certain criticism than it is to the words repeatedly used in the Act itself.

The repeated refrain of the debates on § 8 (b)(1)(A) was actually that it was aimed to secure "equality . . . between employers and employees." [9] Over and over

[9] 93 Cong. Rec. 4021, II Leg. Hist. 1025. See generally 93 Cong. Rec. 4432–4436, II Leg. Hist. 1199–1207.

again, Senator Taft and others emphasized that if a union indulges in conduct that would be an unfair labor practice on the part of an employer, it too should be guilty of an unfair labor practice.[10] Although the Court deems "this parallel . . . clearly . . . inapplicable to the relationship of a union member to his own union," it is clear that the sponsors of § 8 (b)(1)(A) did not think so. Several times, Senator Pepper tried to persuade Senator Taft that there was a difference between an employee's relation to his employer and his relation to his union. On each occasion, Senator Taft replied, "I cannot see any difference." 93 Cong. Rec. 4022, II Leg. Hist. 1026, 1027. When Senator Pepper asked whether the words "restrain or coerce" might have a different application to unions than to employers, Senator Taft replied:

> "The Board has been defining those words for 12 years, ever since it [the Act] came into existence. Its application to labor organizations may have a slightly different implication, but it seems to me perfectly clear that from the point of view of the employee the two cases are *parallel*. . . . If there is anything clear in the development of labor union history in the past 10 years it is that more and more *labor union employees* have come to be subject to the orders of labor union leaders. The bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders. Certainly it seems to me that if we are willing to accept the principle that employees are entitled to the same protection against labor union leaders as against employers, then I can see no reasonable objection to the amendment . . . ." 93 Cong. Rec. 4023, II Leg. Hist. 1028. (Emphasis added.)

[10] 93 Cong. Rec. 4016, II Leg. Hist. 1018; 93 Cong. Rec. 4021, II Leg. Hist. 1025; 93 Cong. Rec. 4023, II Leg. Hist. 1028.

When Senator Pepper replied that Senator Taft was overlooking "the fact that the workers elect their own officers, whereas they do not elect their employers"—precisely the fact that the Court points to in finding the parallel between unions and employers inapplicable—Senator Taft replied:

> "I think it is fair to say that in the case of many of the unions, the employee has a good deal more of an opportunity to select his employer than he has to select his labor-union leader; and even if he has that opportunity . . . the man who is elected may have been voted against by various of the employees who did not desire to have that particular man elected as the union leader. In such cases the very fact that they did vote against that man is often used later by the union as a means of coercing such employees, and *in some cases the union expels them from the union or subjects them to treatment which interferes with their rights as American citizens.*" 93 Cong. Rec. 4023, II Leg. Hist. 1028. (Emphasis added.)

And finally, when Senator Pepper charged that the "amendment is an effort to protect the workers against their own leaders," Senator Taft did not deny it.[11] He clearly stated that the bill was designed to warn unions "that they do not have the right to interfere with or coerce employees, either *their own members* or those outside their union." 93 Cong. Rec. 4025, II Leg. Hist. 1032. (Emphasis added.)

It is true that the Senate sponsors of § 8 (b)(1)(A) were primarily concerned with coercive organizational tactics of unions and that most of the examples of abuse referred to in the debates concerned threats of violence

[11] 93 Cong. Rec. 4023, II Leg. Hist. 1029. Senator Taft merely responded that the section protects nonunion employees as well as union members.

by unions against nonmember employees. But to say that § 8 (b)(1)(A) covers *only* coercive organizational tactics, which the Court comes very close to doing, is to ignore much of the legislative history. It is clear that § 8 (b)(1)(A) was intended to protect union as well as nonunion employees from coercive tactics of unions, and such protection would hardly be provided if the section applied only to organizational tactics. Also, it is clear that Congress was much more concerned with nonviolent economic coercion than with threats of physical violence. As Senator Ball, who introduced the section, put it: "But we are less concerned here with actual acts of violence than we are with threats . . . ." [12] And Senator Taft noted: "There are plenty of methods of coercion short of actual physical violence." [13] Examples were given of cases where unions threatened to double the dues of employees who waited until later to join.[14] It is difficult to see how fining a member is less coercive than doubling his dues, or how the one is "within the ambit of internal union affairs" and the other is not. After the bill was passed, in commenting on some of the abuses it was designed to correct, Senator Wiley said there are "instances in which unions . . . have imposed fines upon their members up to $20,000 because they crossed picket lines—dared to go to the place of employment." [15] Twice during the debate, Senator Taft emphatically stated that the section guarantees employees who wished to work during a strike the right to do so.[16] Though on neither occasion did he expressly

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[12] 93 Cong. Rec. 4017, II Leg. Hist. 1020.

[13] 93 Cong. Rec. 4024, II Leg. Hist. 1031.

[14] 93 Cong. Rec. 4017, II Leg. Hist. 1020; 93 Cong. Rec. 4433, II Leg. Hist. 1200.

[15] 93 Cong. Rec. 5000, II Leg. Hist. 1471.

[16] See n. 1, *supra;* statement by Senator Taft quoted in n. 25 of the Court's opinion.

limit his examples to organizational strikes, the Court reads them as having such a limited reference.[17] Once again the Court utilizes ambiguous, extemporaneous legislative comments to circumvent the unambiguous language of a carefully drafted statute. Congress certainly knew how to limit expressly the applicability of the section to organizational coercion, if it intended to do so.[18]

The Court finds the strongest support for its position in statements of Senator Ball when he accepted the proviso proposed by Senator Holland. When Senator Holland observed, "Apparently it is not intended by the sponsors of the amendment to affect *at least that part of the internal administration* which has to do with the admission or the expulsion of members," [19] Senator Ball replied, "It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions." [20] From this statement by Senator Ball accepting the proviso the Court unjustifiably implies an intent to broaden it. First, there is no reason to suppose that Senator Ball was referring to any "part" of internal affairs other than that to which Senator Holland had referred. Second, the sponsors of the section repeatedly announced that it would protect union members from their leaders, and that protection would be impossible if the section did not to some extent interfere with the internal affairs of unions. As Senator Wiley said, "None of these provisions interferes *unduly* with union affairs, *except to the extent necessary to protect the individual rights of employees.*" [21] Third, the Court recognizes—without hold-

[17] See n. 25 of the Court's opinion.

[18] See, *e. g.*, § 8 (b)(4)(B).

[19] 93 Cong. Rec. 4271, II Leg. Hist. 1139 (emphasis added).

[20] 93 Cong. Rec. 4272, II Leg. Hist. 1141.

[21] 93 Cong. Rec. 5001, II Leg. Hist. 1472 (emphasis added).

ing—that the section may protect union members from "arbitrary" action of union leaders. However, it is difficult to understand how the arbitrariness or nonarbitrariness of a fine determines whether it is within the scope of "internal union affairs." [22]

What the Court does today is to write a new proviso to § 8 (b)(1)(A): "this paragraph shall not impair the right of a labor organization nonarbitrarily to restrain or coerce its members in their exercise of § 7 rights." Nothing in the legislative history supports the creation of this new proviso.

IV.

The Court seeks further support for its holding by reference to the fact that the 1959 Landrum-Griffin

[22] The NLRB has itself recognized that a union "fine is by nature coercive." In *Local 138, Operating Engineers,* 148 N. L. R. B. 679, and *H. B. Roberts, Business Manager of Local 925, Operating Engineers,* 148 N. L. R. B. 674, enforced, 121 U. S. App. D. C. 297, 350 F. 2d 427, the Board held § 8 (b)(1)(A) prohibited a union from fining members who violated an internal union rule against filing charges with the NLRB. The Board concluded that "the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges. The union's conduct is no less coercive where the filing of the charge is alleged to be in conflict with an internal union rule or policy and the fine is imposed allegedly to enforce that internal policy." *Local 138,* 148 N. L. R. B., at 682. In the present case, the Board distinguished *Local 138* and *Roberts* on the ground that the union rules involved there were "beyond the competence of the union to enforce" and were "not the legitimate concern of a union." 149 N. L. R. B. 67, 69. My Brother WHITE seems to take a similar position in resting his concurrence on the Court's holding that the union rule against crossing a picket line is "valid." But neither Congress' aim in § 8 (b)(1)(A) of proscribing certain means used to accomplish legitimate ends, nor the Court's view that Congress intended no interference with internal union affairs, would allow the application of the section to depend on the Board's or this Court's views of whether a particular internal union rule is "valid" or not.

amendments were "thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs." And the Court thinks that to construe § 8 (b) (1)(A) according to its literal language to prohibit fines "is to say that Congress preceded the Landrum-Griffin amendments with an even more pervasive regulation of the internal affairs of unions." [23] But again the Court fails to distinguish between court-enforced fines and fines enforced by the traditional method of expulsion. Although both kinds of fines are coercive, I have already indicated that the proviso to § 8 (b)(1)(A) may preserve the union's right to impose fines which are enforceable only by expulsion and that expulsion was the common mode of enforcing fines at the time the section was adopted. If one assumes that the only fines prohibited by the section are court-enforced fines, then the section was not a pervasive regulation of union internal affairs. If court enforcement of fines is within the ambit of internal union affairs, which I doubt, then those affairs were only incidentally regulated by a flat prohibition of this seldom-used method of union discipline. If the common forms of union discipline—expulsion and fines enforceable by expulsion—were not prohibited or regulated by Taft-Hartley, then Landrum-Griffin was indeed the first comprehensive regulation of them.

V.

The union here had a union security clause in its contract with Allis-Chalmers. That clause made it necessary

[23] Although the Landrum-Griffin Act might be resorted to for the purpose of determining the limits of "vague language" in the Taft-Hartley Act, it should not be used, as the Court here uses it, to deprive employees of rights unequivocally granted them by the earlier Act. Section 103 of the Landrum-Griffin Act, 73 Stat. 523 (1959), 29 U. S. C. § 413, expressly provides: "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any . . . Federal law . . . ."

for all employees, including the ones involved here, to pay dues and fees to the union. But § 8 (a)(3) and § 8 (b)(2) make it clear that "Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Radio Officers' Union* v. *Labor Board*, 347 U. S. 17, 41. If the union uses the union security clause to compel employees to pay dues, characterizes such employees as members, and then uses such membership as a basis for imposing court-enforced fines upon those employees unwilling to participate in a union strike, then the union security clause is being used for a purpose other than "to compel payment of union dues and fees." It is being used to coerce employees to join in union activity in violation of § 8 (b)(2).

The Court suggests that this problem is not present here, because the fined employees failed to prove they enjoyed other than full union membership, that their role in the union was not in fact limited to the obligation of paying dues. For several reasons, I am unable to agree with the Court's approach. Few employees forced to become "members" of the union by virtue of the union security clause will be aware of the fact that they must somehow "limit" their membership to avoid the union's court-enforced fines. Even those who are brash enough to attempt to do so may be unfamiliar with how to do it. Must they refrain from doing anything but paying dues, or will signing the routine union pledge still leave them with less than full membership? And finally, it is clear that what restrains the employee from going to work during a union strike is the union's threat that it will fine him and collect the fine from him in court. How many employees in a union shop whose names appear on the union's membership rolls will be willing to ignore that threat in the hope that they will later be able to convince the Labor Board or

the state court that they were not full members of the union? By refusing to decide whether § 8 (b)(1)(A) prohibits the union from fining an employee who does nothing more than pay union dues as a condition to retaining his job in a union shop, the Court adds coercive impetus to the union's threat of fines. Today's decision makes it highly dangerous for an employee in a union shop to exercise his § 7 right to refrain from participating in a strike called by a union in which he is a member in name only.

VI.

The National Labor Relations Act, as originally passed and amended from time to time, is the work product of draftsmen skilled by long experience in labor affairs. These draftsmen thoroughly understood labor legislation terminology, especially the oft-used words "restrain or coerce." Sections 7 and 8 together bespeak a strong purpose of Congress to leave workers wholly free to determine in what concerted labor activities they will engage or decline to engage. This freedom of workers to go their own way in this field, completely unhampered by pressures of employers or unions, is and always has been a basic purpose of the labor legislation now under consideration. In my judgment it ill behooves this Court to strike so diligently to defeat this unequivocally declared purpose of Congress, merely because the Court believes that too much freedom of choice for workers will impair the effective power of unions. Cf. *Vaca* v. *Sipes*, 386 U. S. 171, 203 (dissenting opinion). A court-enforced fine is certainly coercive, certainly affects the employee's job, and certainly is not a traditional method of internal union discipline. When applied by a union to an employee who has joined it as a condition of obtaining employment in a union shop, it defeats the provisions of the Act designed to prevent union security clauses

from being used for purposes other than to compel payment of dues. In such a situation it cannot be justified on any theory that the employee has contracted away or waived his § 7 rights.

Where there is clear legislative history to justify it, courts often decline to follow the literal meaning of a statute. But this practice is fraught with dangers when the legislative history is at best brief, inconclusive, and ambiguous. This is precisely such a case, and I dissent because I am convinced that the Court has ignored the literal language of § 8 (b)(1)(A) in order to give unions a power which the Court, but not Congress, thinks they need.

UNITED STATES *v.* WADE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 334. Argued February 16, 1967.—Decided June 12, 1967.

Several weeks after respondent's indictment for robbery of a federally insured bank and for conspiracy, respondent, without notice to his appointed counsel, was placed in a lineup in which each person wore strips of tape on his face, as the robber allegedly had done, and on direction repeated words like those the robber allegedly had used. Two bank employees identified respondent as the robber. At the trial when asked if the robber was in the courtroom, they identified respondent. The prior lineup identifications were elicited on cross-examination. Urging that the conduct of the lineup violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel, respondent filed a motion for judgment of acquittal or, alternatively, to strike the courtroom identifications. The trial court denied the motions and respondent was convicted. The Court of Appeals reversed, holding that though there was no Fifth Amendment deprivation the absence of counsel at the lineup denied respondent his right to counsel under the Sixth Amendment and required the grant of a new trial at which the in-court identifications of those who had made lineup identifications would be excluded. *Held:*

1. Neither the lineup itself nor anything required therein violated respondent's Fifth Amendment privilege against self-incrimination since merely exhibiting his person for observation by witnesses and using his voice as an identifying physical characteristic involved no compulsion of the accused to give evidence of a testimonial nature against himself which is prohibited by that Amendment. Pp. 221–223.

2. The Sixth Amendment guarantees an accused the right to counsel not only at his trial but at any critical confrontation by the prosecution at pretrial proceedings where the results might well determine his fate and where the absence of counsel might derogate from his right to a fair trial. Pp. 223–227.

3. The post-indictment lineup (unlike such preparatory steps as analyzing fingerprints and blood samples) was a critical prosecutive stage at which respondent was entitled to the aid of counsel. Pp. 227–239.

(a) There is a great possibility of unfairness to the accused at that point, (1) because of the manner in which confrontations for identification are frequently conducted, (2) because of dangers inherent in eyewitness identification and suggestibility inherent in the context of the confrontations, and (3) because of the likelihood that the accused will often be precluded from reconstructing what occurred and thereby obtaining a full hearing on the identification issue at trial. Pp. 229–235.

(b) This case illustrates the potential for improper influence on witnesses through the lineup procedure, since the bank employees were allowed to see respondent in the custody of FBI agents before the lineup began. Pp. 233–234.

(c) The presence of counsel at the lineup will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. Pp. 236–238.

4. In-court identification by a witness to whom the accused was exhibited before trial in the absence of counsel must be excluded unless it can be established that such evidence had an independent origin or that error in its admission was harmless. Since it is not clear that the Court of Appeals applied the prescribed rule of exclusion, and since the nature of the in-court identifications here was not an issue in the trial and cannot be determined on the record, the case must be remanded to the District Court for resolution of these issues. Pp. 239–243.

358 F. 2d 557, vacated and remanded.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Nathan Lewin* and *Ronald L. Gainer.*

Weldon Holcomb argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for

identification purposes without notice to and in the absence of the accused's appointed counsel.

The federally insured bank in Eustace, Texas, was robbed on September 21, 1964. A man with a small strip of tape on each side of his face entered the bank, pointed a pistol at the female cashier and the vice president, the only persons in the bank at the time, and forced them to fill a pillowcase with the bank's money. The man then drove away with an accomplice who had been waiting in a stolen car outside the bank. On March 23, 1965, an indictment was returned against respondent, Wade, and two others for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later an FBI agent, without notice to Wade's lawyer, arranged to have the two bank employees observe a lineup made up of Wade and five or six other prisoners and conducted in a courtroom of the local county courthouse. Each person in the line wore strips of tape such as allegedly worn by the robber and upon direction each said something like "put the money in the bag," the words allegedly uttered by the robber. Both bank employees identified Wade in the lineup as the bank robber.

At trial, the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination. At the close of testimony, Wade's counsel moved for a judgment of acquittal or, alternatively, to strike the bank officials' courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted. The

Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded, holding that, though the lineup did not violate Wade's Fifth Amendment rights, "the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights . . . ." 358 F. 2d 557, 560. We granted certiorari, 385 U. S. 811, and set the case for oral argument with No. 223, *Gilbert* v. *California*, *post*, p. 263, and No. 254, *Stovall* v. *Denno*, *post*, p. 293, which present similar questions. We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

I.

Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ." *Schmerber* v. *California*, 384 U. S. 757, 761. We there held that compelling a suspect to submit to a withdrawal of a sample of his blood for analysis for alcohol content and the admission in evidence of the analysis report were not compulsion to those ends. That holding was supported by the opinion in *Holt* v. *United States*, 218 U. S. 245, in which case a question arose as to whether a blouse belonged to the defendant. A witness testified at trial that the defendant put on the blouse and it had fit him. The defendant argued that the admission of the testimony was error because compelling him to put on the blouse was a violation of his privilege. The Court

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rejected the claim as "an extravagant extension of the Fifth Amendment," Mr. Justice Holmes saying for the Court:

> "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." 218 U. S., at 252–253.

The Court in *Holt,* however, put aside any constitutional questions which might be involved in compelling an accused, as here, to exhibit himself before victims of or witnesses to an alleged crime; the Court stated, "we need not consider how far a court would go in compelling a man to exhibit himself." *Id.,* at 253.[1]

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; he was required to use his voice as an identifying

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[1] *Holt* was decided before *Weeks* v. *United States,* 232 U. S. 383, fashioned the rule excluding illegally obtained evidence in a federal prosecution. The Court therefore followed *Adams* v. *New York,* 192 U. S. 585, in holding that, in any event, "when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent." 218 U. S., at 253.

physical characteristic, not to speak his guilt. We held in *Schmerber, supra,* at 761, that the distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's "communications" in whatever form, vocal or physical, and "compulsion which makes a suspect or accused the source of 'real or physical evidence,'" *Schmerber, supra,* at 764. We recognized that "both federal and state courts have usually held that . . . [the privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.,* at 764. None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup.

Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the bank employees involved no violation of Wade's privilege.

II.

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel. Our rejection of the right to counsel claim in *Schmerber* rested on our conclusion in that case that "[n]o issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." 384 U. S., at 766. In contrast, in this case it is urged that the assistance of counsel at the lineup was indispensable

to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in "matters of law," and eschewing any responsibility for "matters of fact." [2] The constitutions in at least 11 of the 13 States expressly or impliedly abolished this distinction. *Powell* v. *Alabama*, 287 U. S. 45, 60–65; Note, 73 Yale L. J. 1000, 1030–1033 (1964). "Though the colonial provisions about counsel were in accord on few things, they agreed on the necessity of abolishing the facts-law distinction; the colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed." 73 Yale L. J., *supra*, at 1033–1034. This background is reflected in the scope given by our decisions to the Sixth Amendment's guarantee to an accused of the assistance of counsel for his defense. When the Bill of Rights was adopted, there were no organized police forces as we know them today.[3] The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal

[2] See *Powell* v. *Alabama*, 287 U. S. 45, 60–65; Beaney, Right to Counsel in American Courts 8–26.

[3] See Note, 73 Yale L. J. 1000, 1040–1042 (1964); Comment, 53 Calif. L. Rev. 337, 347–348 (1965).

prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defence.*" (Emphasis supplied.) The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."

As early as *Powell* v. *Alabama, supra,* we recognized that the period from arraignment to trial was "perhaps the most critical period of the proceedings . . . ," *id.,* at 57, during which the accused "requires the guiding hand of counsel . . . ," *id.,* at 69, if the guarantee is not to prove an empty right. That principle has since been applied to require the assistance of counsel at the type of arraignment—for example, that provided by Alabama—where certain rights might be sacrificed or lost: "What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted . . . ." *Hamilton* v. *Alabama,* 368 U. S. 52, 54. See *White* v. *Maryland,* 373 U. S. 59. The principle was also applied in *Massiah* v. *United States,* 377 U. S. 201, where we held that incriminating statements of the defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant. We said, quoting a concurring opinion in *Spano* v. *New York,* 360 U. S. 315, 326, that "[a]nything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' " 377 U. S., at 204.

In *Escobedo* v. *Illinois,* 378 U. S. 478, we drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's pres-

ence if the accused was to have a fair opportunity to present a defense at the trial itself:

> "The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination' . . . . 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."' " 378 U. S., at 487–488.

Finally in *Miranda* v. *Arizona*, 384 U. S. 436, the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation.

Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions "no more than reflect a constitutional principle established as long ago as *Powell* v. *Alabama* . . . ." *Massiah* v. *United States*, *supra*, at 205. It is central to that principle that in addition to counsel's presence at trial,[4] the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[5] The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the

[4] See, *e. g.*, *Powell* v. *Alabama*, 287 U. S. 45; *Hamilton* v. *Alabama*, 368 U. S. 52; *White* v. *Maryland*, 373 U. S. 59; *Escobedo* v. *Illinois*, 378 U. S. 478; *Massiah* v. *United States*, 377 U. S. 201.

[5] See cases cited n. 4, *supra*; *Avery* v. *Alabama*, 308 U. S. 444, 446.

Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. Cf. *Pointer* v. *Texas,* 380 U. S. 400.

In sum, the principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

III.

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different—for Sixth Amendment purposes—from various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at

trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

IV.

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.[6] Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commenta-

[6] Borchard, Convicting the Innocent; Frank & Frank, Not Guilty; Wall, Eye-Witness Identification in Criminal Cases; 3 Wigmore, Evidence § 786a (3d ed. 1940); Rolph, Personal Identity; Gross, Criminal Investigation 47–54 (Jackson ed. 1962); Williams, Proof of Guilt 83–98 (1955); Wills, Circumstantial Evidence 192–205 (7th ed. 1937); Wigmore, The Science of Judicial Proof §§ 250–253 (3d ed. 1937).

tor has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined." Wall, Eye-Witness Identification in Criminal Cases 26. Suggestion can be created intentionally or unintentionally in many subtle ways.[7] And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." [8]

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an "identification parade" or "showup," as in the present case, or presentation of the suspect alone to the witness, as in *Stovall* v. *Denno, supra.* It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.[9] But

[7] See Wall, *supra,* n. 6, at 26–65; Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610; Napley, Problems of Effecting the Presentation of the Case for a Defendant, 66 Col. L. Rev. 94, 98–99 (1966); Williams, Identification Parades, [1955] Crim. L. Rev. (Eng.) 525; Paul, Identification of Accused Persons, 12 Austl. L. J. 42 (1938); Houts, From Evidence to Proof 25; Williams & Hammelmann, Identification Parades, Parts I & II, [1963] Crim. L. Rev. 479–490, 545–555; Gorphe, Showing Prisoners to Witnesses for Identification, 1 Am. J. Police Sci. 79 (1930); Wigmore, The Science of Judicial Proof, *supra,* n. 6, at § 253; Devlin, The Criminal Prosecution in England 70; Williams, Proof of Guilt 95–97.

[8] Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 482.

[9] Williams & Hammelmann, Identification Parades, Part I, *supra,* n. 7.

as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on . . . ." *Miranda* v. *Arizona, supra,* at 448. For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers;[10] in any event, the participants' names are rarely recorded or divulged at trial.[11] The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives.[12] In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences.[13] Improper in-

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[10] See Wall, *supra,* n. 6, at 57–59; see, *e. g., People* v. *Boney,* 28 Ill. 2d 505, 192 N. E. 2d 920 (1963); *People* v. *James,* 218 Cal. App. 2d 166, 32 Cal. Rptr. 283 (1963).

[11] See Rolph, Personal Identity 50: "The bright burden of identity, at these parades, is lifted from the innocent participants to hover about the suspect, leaving the rest featureless and unknown and without interest."

[12] See Williams & Hammelmann, Identification Parades, Part II, [1963] Crim. L. Rev. 545, 546; Borchard, Convicting the Innocent 367.

[13] An additional impediment to the detection of such influences by participants, including the suspect, is the physical conditions often surrounding the conduct of the lineup. In many, lights shine on the stage in such a way that the suspect cannot see the witness. See *Gilbert* v. *United States,* 366 F. 2d 923 (C. A. 9th Cir. 1966). In some a one-way mirror is used and what is said on the witness'

fluences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers.[14] Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; [15] the jury's choice is between the accused's unsupported version and that of the police officers present.[16] In short, the accused's

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side cannot be heard. See *Rigney* v. *Hendrick*, 355 F. 2d 710, 711, n. 2 (C. A. 3d Cir. 1965); *Aaron* v. *State*, 273 Ala. 337, 139 So. 2d 309 (1961).

[14] Williams & Hammelmann, Part I, *supra*, n. 7, at 489; Napley, *supra*, n. 7, at 99.

[15] See *In re Groban*, 352 U. S. 330, 340 (BLACK, J., dissenting). The difficult position of defendants in attempting to protest the manner of pretrial identification is illustrated by the many state court cases in which contentions of blatant abuse rested on their unsupportable allegations, usually controverted by the police officers present. See, *e. g.*, *People* v. *Shields*, 70 Cal. App. 2d 628, 634–635, 161 P. 2d 475, 478–479 (1945); *People* v. *Hicks*, 22 Ill. 2d 364, 176 N. E. 2d 810 (1961); *State* v. *Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *Redmon* v. *Commonwealth*, 321 S. W. 2d 397 (Ky. Ct. App. 1959); *Lubinski* v. *State*, 180 Md. 1, 8, 22 A. 2d 455, 459 (1941). For a striking case in which hardly anyone agreed upon what occurred at the lineup, including who identified whom, see *Johnson* v. *State*, 237 Md. 283, 206 A. 2d 138 (1965).

[16] An instructive example of the defendant's predicament may be found in *Proctor* v. *State*, 223 Md. 394, 164 A. 2d 708 (1960). A prior identification is admissible in Maryland only under the salutary rule that it cannot have been made "under conditions of unfairness or unreliability." *Id.*, at 401, 164 A. 2d, at 712. Against the defendant's contention that these conditions had not been met, the Court stated:

"In the instant case, there are no such facts as, in our judgment, would call for a finding that the identification . . . was made under conditions of unfairness or unreliability. The relatively large number of persons put into the room together for [the victim] to look at

inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

What facts have been disclosed in specific cases about the conduct of pretrial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for its revelation at trial. A commentator provides some striking examples:

> "In a Canadian case . . . the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a black-haired suspect was placed among a group of light-haired persons, tall suspects have been made to stand with short non-suspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a line-up with five other persons, all of whom were forty or over." [17]

Similarly state reports, in the course of describing prior identifications admitted as evidence of guilt, reveal

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is one circumstance indicating fairness, and the fact that the police officer was unable to remember the appearances of the others and could not recall if they had physical characteristics similar to [the defendant's] or not is at least suggestive that they were not of any one type or that they all differed markedly in looks from the defendant. There is no evidence that the Police Sergeant gave the complaining witness any indication as to which of the thirteen men was the defendant; the Sergeant's testimony is simply that he asked [the victim] if he could identify [the defendant] after having put the thirteen men in the courtroom."

[17] Wall, Eye-Witness Identification in Criminal Cases 53. For other such examples see Houts, From Evidence to Proof 25; Frankfurter, The Case of Sacco and Vanzetti 12–14, 30–32; 3 Wigmore, Evidence § 786a, at 164, n. 2 (3d ed. 1940); Paul, Identification of Accused Persons, 12 Austl. L. J. 42, 44 (1938); Rolph, Personal Identity 34–43.

numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness,[18] that the other participants in a lineup were grossly dissimilar in appearance to the suspect,[19] that only the suspect was required to wear distinctive clothing which the culprit allegedly wore,[20] that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail,[21] that the suspect is pointed out before or during a lineup,[22] and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.[23]

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identi-

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[18] See *People* v. *James*, 218 Cal. App. 2d 166, 170–171, 32 Cal. Rptr. 283, 286 (1963); *People* v. *Boney*, 28 Ill. 2d 505, 192 N. E. 2d 920 (1963).

[19] See *Fredericksen* v. *United States*, 105 U. S. App. D. C. 262, 266 F. 2d 463 (1959); *People* v. *Adell*, 75 Ill. App. 2d 385, 221 N. E. 2d 72 (1966); *State* v. *Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *People* v. *Seppi*, 221 N. Y. 62, 116 N. E. 793 (1917); *State* v. *Duggan*, 215 Ore. 151, 162, 333 P. 2d 907, 912 (1958).

[20] See *People* v. *Crenshaw*, 15 Ill. 2d 458, 460, 155 N. E. 2d 599, 602 (1959); *Presley* v. *State*, 224 Md. 550, 168 A. 2d 510 (1961); *State* v. *Ramirez*, 76 N. M. 72, 412 P. 2d 246 (1966); *State* v. *Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927); *Barrett* v. *State*, 190 Tenn. 366, 229 S. W. 2d 516 (1950).

[21] See *Aaron* v. *State*, 273 Ala. 337, 139 So. 2d 309 (1961); *Bishop* v. *State*, 236 Ark. 12, 364 S. W. 2d 676 (1963); *People* v. *Thompson*, 406 Ill. 555, 94 N. E. 2d 349 (1950); *People* v. *Berne*, 384 Ill. 334, 51 N. E. 2d 578 (1943); *People* v. *Martin*, 304 Ill. 494, 136 N. E. 711 (1922); *Barrett* v. *State*, 190 Tenn. 366, 229 S. W. 2d 516 (1950).

[22] See *People* v. *Clark*, 28 Ill. 2d 423, 192 N. E. 2d 851 (1963); *Gillespie* v. *State*, 355 P. 2d 451, 454 (Okla. Cr. 1960).

[23] See *People* v. *Parham*, 60 Cal. 2d 378, 384 P. 2d 1001 (1963).

fying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade "standing in the hall" within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw a person in the hall in the custody of the agent who "resembled the person that we identified as the one that had entered the bank." [24]

The lineup in *Gilbert, supra,* was conducted in an auditorium in which some 100 witnesses to several alleged state and federal robberies charged to Gilbert made wholesale identifications of Gilbert as the robber in each other's presence, a procedure said to be fraught with dangers of suggestion.[25] And the vice of suggestion created by the identification in *Stovall, supra,* was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police. See Frankfurter, The Case of Sacco and Vanzetti 31–32.

The few cases that have surfaced therefore reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the

[24] See Wall, *supra,* n. 6, at 48; Napley, *supra,* n. 7, at 99: "[W]hile many identification parades are conducted by the police with scrupulous regard for fairness, it is not unknown for the identifying witness to be placed in a position where he can see the suspect before the parade forms . . . ."

[25] Williams & Hammelmann, Part I, *supra,* n. 7, at 486; Burtt, Applied Psychology 254–255.

secrecy of the confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification. Williams & Hammelmann, in one of the most comprehensive studies of such forms of identification, said, "[T]he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way . . . ." Identification Parades, Part I, [1963] Crim. L. Rev. 479, 483.

Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer* v. *Texas,* 380 U. S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no

effective appeal from the judgment there rendered by the witness—"that's the man."

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial,[26] there can be

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[26] One commentator proposes a model statute providing not only for counsel, but other safeguards as well:

"Most, if not all, of the attacks on the lineup process could be averted by a uniform statute modeled upon the best features of the civilian codes. Any proposed statute should provide for the right to counsel during any lineup or during any confrontation. Provision should be made that any person, whether a victim or a witness, must give a description of the suspect before he views any arrested person. A written record of this description should be required, and the witness should be made to sign it. This written record would be available for inspection by defense counsel for copying before the trial and for use at the trial in testing the accuracy of the identification made during the lineup and during the trial.

"This ideal statute would require at least six persons in addition to the accused in a lineup, and these persons would have to be of approximately the same height, weight, coloration of hair and skin, and bodily types as the suspect. In addition, all of these men should, as nearly as possible, be dressed alike. If distinctive garb was used during the crime, the suspect should not be forced to wear similar clothing in the lineup unless all of the other persons are similarly garbed. A complete written report of the names, addresses, descriptive details of the other persons in the lineup, and of everything which transpired during the identification would be mandatory. This report would include everything stated by the identifying witness during this step, including any reasons given by him as to what features, etc., have sparked his recognition.

"This statute should permit voice identification tests by having each person in the lineup repeat identical innocuous phrases, and it would be impermissible to force the use of words allegedly used during a criminal act.

"The statute would enjoin the police from suggesting to any viewer that one or more persons in the lineup had been arrested as a suspect. If more than one witness is to make an identification, each

little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell* v. *Alabama*, 287 U. S. 45, 57. Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver." See *Carnley* v. *Cochran*, 369 U. S. 506. No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations. As for the first, we note that in the two cases in which the right to counsel is today held to apply, counsel had already been appointed and no argument is made in either case that notice to counsel would have prejudicially delayed the confrontations. Moreover, we leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.[27] And to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the

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witness should be required to do so separately and should be forbidden to speak to another witness until all of them have completed the process.

"The statute could require the use of movie cameras and tape recorders to record the lineup process in those states which are financially able to afford these devices. Finally, the statute should provide that any evidence obtained as the result of a violation of this statute would be inadmissible." Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610, 627–628.

[27] Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's *own* counsel.

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basic assumptions upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in *Miranda* v. *Arizona* concerning presence of counsel during custodial interrogation, 384 U. S., at 480–481:

> "[A]n attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution."

In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence.[28] That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.[29]

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[28] Concern is also expressed that the presence of counsel will force divulgence of the identity of government witnesses whose identity the Government may want to conceal. To the extent that this is a valid or significant state interest there are police practices commonly used to effect concealment, for example, masking the face.

[29] Many other nations surround the lineup with safeguards against prejudice to the suspect. In England the suspect must be allowed the presence of his solicitor or a friend, Napley, *supra*, n. 7, at 98–99; Germany requires the presence of retained counsel; France forbids the confrontation of the suspect in the absence of his counsel; Spain, Mexico, and Italy provide detailed procedures prescribing the conditions under which confrontation must occur under the supervision of a judicial officer who sees to it that the proceedings are officially recorded to assure adequate scrutiny at trial. Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610, 621–627.

Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical." [30] But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect." *Miranda* v. *Arizona*, *supra*, at 467.

V.

We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is

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[30] Thirty years ago Wigmore suggested a "scientific method" of pretrial identification "to reduce the risk of error hitherto inherent in such proceedings." Wigmore, The Science of Judicial Proof 541 (3d ed. 1937). Under this approach, at least 100 talking films would be prepared of men from various occupations, races, etc. Each would be photographed in a number of stock movements, with and without hat and coat, and would read aloud a standard passage. The suspect would be filmed in the same manner. Some 25 of the films would be shown in succession in a special projection room in which each witness would be provided an electric button which would activate a board backstage when pressed to indicate that the witness had identified a given person. Provision would be made for the degree of hesitancy in the identification to be indicated by the number of presses. *Id.*, at 540–541. Of course, the more systematic and scientific a process or proceeding, including one for purposes of identification, the less the impediment to reconstruction of the conditions bearing upon the reliability of that process or proceeding at trial. See discussion of fingerprint and like tests, Part III, *supra*, and of handwriting exemplars in *Gilbert* v. *California*, *supra*.

to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. See *Murphy* v. *Waterfront Commission,* 378 U. S. 52, 79, n. 18.[31] Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified.[32] See *Nardone* v. *United States,* 308 U. S. 338, 341. A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark

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[31] See *Goldstein* v. *United States,* 316 U. S. 114, 124, n. 1 (Murphy, J., dissenting). "[A]fter an accused sustains the initial burden, imposed by *Nardone* v. *United States,* 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin."

[32] We reach a contrary conclusion in *Gilbert* v. *California, supra,* as to the admissibility of the witness' testimony that he also identified the accused at the lineup.

in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun* v. *United States,* 371 U. S. 471, 488, " '[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt 221 (1959)." See also *Hoffa* v. *United States,* 385 U. S. 293, 309. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.[33]

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[33] Thus it is not the case that "[i]t matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime." Such factors will have an important bearing upon the true basis of

We doubt that the Court of Appeals applied the proper test for exclusion of the in-court identification of the two witnesses. The court stated that "it cannot be said with any certainty that they would have recognized appellant at the time of trial if this intervening lineup had not occurred," and that the testimony of the two witnesses "may well have been colored by the illegal procedure [and] was prejudicial." 358 F. 2d, at 560. Moreover, the court was persuaded, in part, by the "compulsory verbal responses made by Wade at the instance of the Special Agent." *Ibid.* This implies the erroneous holding that Wade's privilege against self-incrimination was violated so that the denial of counsel required exclusion.

On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error, *Chapman* v. *California,* 386 U. S. 18, and for the District Court to reinstate the conviction or order a new trial, as may be proper. See *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233, 245–246.

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the witness' in-court identification. Moreover, the State's inability to bolster the witness' courtroom identification by introduction of the lineup identification itself, see *Gilbert* v. *California, supra,* will become less significant the more the evidence of other opportunities of the witness to observe the defendant. Thus where the witness is a "kidnap victim who has lived for days with his abductor" the value to the State of admission of the lineup identification is indeed marginal, and such identification would be a mere formality.

The judgment of the Court of Appeals is vacated and the case is remanded to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE joins the opinion of the Court except for Part I, from which he dissents for the reasons expressed in the opinion of MR. JUSTICE FORTAS.

MR. JUSTICE DOUGLAS joins the opinion of the Court except for Part I. On that phase of the case he adheres to the dissenting views in *Schmerber* v. *California*, 384 U. S. 757, 772–779, since he believes that compulsory lineup violates the privilege against self-incrimination contained in the Fifth Amendment.

MR. JUSTICE CLARK, concurring.

With reference to the lineup point involved in this case I cannot, for the life of me, see why a lineup is not a critical stage of the prosecution. Identification of the suspect—a prerequisite to establishment of guilt—occurs at this stage, and with *Miranda* v. *Arizona*, 384 U. S. 436 (1966), on the books, the requirement of the presence of counsel arises, unless waived by the suspect. I dissented in *Miranda* but I am bound by it now, as we all are. *Schmerber* v. *California*, 384 U. S. 757 (1966), precludes petitioner's claim of self-incrimination. I therefore join the opinion of the Court.

MR. JUSTICE BLACK, dissenting in part and concurring in part.

On March 23, 1965, respondent Wade was indicted for robbing a bank; on April 2, he was arrested; and on April 26, the court appointed a lawyer to represent him.

Fifteen days later, while Wade was still in custody, an FBI agent took him and several other prisoners into a room at the courthouse, directed each to participate in a lineup wearing strips of tape on his face and to speak the words used by the robber at the bank. This was all done in order to let the bank employee witnesses look at Wade for identification purposes. Wade's lawyer was not notified of or present at the lineup to protect his client's interests. At Wade's trial, two bank employees identified him in the courtroom. Wade objected to this testimony, when, on cross-examination, his counsel elicited from these witnesses the fact that they had seen Wade in the lineup. He contended that by forcing him to participate in the lineup, wear strips of tape on his face, and repeat the words used by the robber, all without counsel, the Government had (1) compelled him to be a witness against himself in violation of the Fifth Amendment, and (2) deprived him of the assistance of counsel for his defense in violation of the Sixth Amendment.

The Court in Part I of its opinion rejects Wade's Fifth Amendment contention. From that I dissent. In Parts II–IV of its opinion, the Court sustains Wade's claim of denial of right to counsel in the out-of-court lineup, and in that I concur. In Part V, the Court remands the case to the District Court to consider whether the courtroom identification of Wade was the fruit of the illegal lineup, and, if it was, to grant him a new trial unless the court concludes that the courtroom identification was harmless error. I would reverse the Court of Appeals' reversal of Wade's conviction, but I would not remand for further proceedings. Since the prosecution did not use the out-of-court lineup identification against Wade at his trial, I believe the conviction should be affirmed.

I.

In rejecting Wade's claim that his privilege against self-incrimination was violated by compelling him to appear in the lineup wearing the tape and uttering the words given him by the police, the Court relies on the recent holding in *Schmerber* v. *California,* 384 U. S. 757. In that case the Court held that taking blood from a man's body against his will in order to convict him of a crime did not compel him to be a witness against himself. I dissented from that holding, 384 U. S., at 773, and still dissent. The Court's reason for its holding was that the sample of Schmerber's blood taken in order to convict him of crime was neither "testimonial" nor "communicative" evidence. I think it was both. It seems quite plain to me that the Fifth Amendment's Self-incrimination Clause was designed to bar the Government from forcing any person to supply proof of his own crime, precisely what Schmerber was forced to do when he was forced to supply his blood. The Government simply took his blood against his will and over his counsel's protest for the purpose of convicting him of crime. So here, having Wade in its custody awaiting trial to see if he could or would be convicted of crime, the Government forced him to stand in a lineup, wear strips on his face, and speak certain words, in order to make it possible for government witnesses to identify him as a criminal. Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself. Being forced by the Government to help convict himself and to supply evidence against himself by talking outside the courtroom is equally violative of his constitutional right not to be compelled to be a witness against himself. Consequently, because of this violation of the Fifth Amend-

ment, and not because of my own personal view that the Government's conduct was "unfair," "prejudicial," or "improper," I would prohibit the prosecution's use of lineup identification at trial.

II.

I agree with the Court, in large part because of the reasons it gives, that failure to notify Wade's counsel that Wade was to be put in a lineup by government officers and to be forced to talk and wear tape on his face denied Wade the right to counsel in violation of the Sixth Amendment. Once again, my reason for this conclusion is solely the Sixth Amendment's guarantee that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." As this Court's opinion points out, "[t]he plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" And I agree with the Court that a lineup is a "critical stage" of the criminal proceedings against an accused, because it is a stage at which the Government makes use of his custody to obtain crucial evidence against him. Besides counsel's presence at the lineup being necessary to protect the defendant's specific constitutional rights to confrontation and the assistance of counsel at the trial itself, the assistance of counsel at the lineup is also necessary to protect the defendant's in-custody assertion of his privilege against self-incrimination, *Miranda* v. *Arizona*, 384 U. S. 436, for, contrary to the Court, I believe that counsel may advise the defendant not to participate in the lineup or to participate only under certain conditions.

I agree with the Court that counsel's presence at the lineup is necessary to protect the accused's right to a "fair trial," only if by "fair trial" the Court means a trial in accordance with the "Law of the Land" as specifically set out in the Constitution. But there are

implications in the Court's opinion that by a "fair trial" the Court means a trial which a majority of this Court deems to be "fair" and that a lineup is a "critical stage" only because the Court, now assessing the "innumerable dangers" which inhere in it, thinks it is such. That these implications are justified is evidenced by the Court's suggestion that "[l]egislative or other regulations . . . which eliminate the risks of abuse . . . at lineup proceedings . . . may also remove the basis for regarding the stage as 'critical.'" And it is clear from the Court's opinion in *Gilbert* v. *California, post,* p. 263, that it is willing to make the Sixth Amendment's guarantee of right to counsel dependent on the Court's own view of whether a particular stage of the proceedings—though "critical" in the sense of the prosecution's gathering of evidence—is "critical" to the Court's own view of a "fair trial." I am wholly unwilling to make the specific constitutional right of counsel dependent on judges' vague and transitory notions of fairness and their equally transitory, though thought to be empirical, assessment of the "risk that . . . counsel's absence . . . might derogate from . . . [a defendant's] right to a fair trial." *Ante,* at 228. See *Pointer* v. *Texas,* 380 U. S. 400, 412 (concurring opinion of Goldberg, J.).

III.

I would reverse Wade's conviction without further ado had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification. But the prosecution here did neither of these things. After prosecution witnesses under oath identified Wade in the courtroom, it was the defense, and not the prosecution, which brought out the prior lineup identification. While stating that "a *per se* rule of exclusion of courtroom identification would be unjustified," the Court, nevertheless, remands this case for "a

hearing to determine whether the in-court identifications had an independent source," or were the tainted fruits of the invalidly conducted lineup. From this holding I dissent.

In the first place, even if this Court has power to establish such a rule of evidence, I think the rule fashioned by the Court is unsound. The "tainted fruit" determination required by the Court involves more than considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup? What kind of "clear and convincing evidence" can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest? How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses? All these questions are posed but not answered by the Court's opinion. In my view, the Fifth and Sixth Amendments are satisfied if the prosecution is precluded from using lineup identification as either an alternative to or corroboration of courtroom identification. If the prosecution does neither and its witnesses under oath identify the defendant in the courtroom, then I can find no justification for stopping the trial in midstream to hold a lengthy "tainted fruit" hearing. The fact of and circumstances surrounding a prior lineup identification might be used by the defense to impeach the credibility of the in-court identifications, but not to exclude them completely.

But more important, there is no constitutional provision upon which I can rely that directly or by implication gives this Court power to establish what amounts to a constitutional rule of evidence to govern, not only the Federal Government, but the States in their trial of state

crimes under state laws in state courts. See *Gilbert* v. *California, supra.* The Constitution deliberately reposed in the States very broad power to create and to try crimes according to their own rules and policies. *Spencer* v. *Texas,* 385 U. S. 554. Before being deprived of this power, the least that they can ask is that we should be able to point to a federal constitutional provision that either by express language or by necessary implication grants us the power to fashion this novel rule of evidence to govern their criminal trials. Cf. *Berger* v. *New York, ante,* p. 70 (BLACK, J., dissenting). Neither *Nardone* v. *United States,* 308 U. S. 338, nor *Wong Sun* v. *United States,* 371 U. S. 471, both federal cases and both decided "in other contexts," supports what the Court demands of the States today.

Perhaps the Court presumes to write this constitutional rule of evidence on the basis of the Fourteenth Amendment's Due Process Clause. This is not the time or place to consider that claim. Suffice it for me to say briefly that I find no such authority in the Due Process Clause. It undoubtedly provides that a person must be tried in accordance with the "Law of the Land." Consequently, it violates due process to try a person in a way prohibited by the Fourth, Fifth, or Sixth Amendments of our written Constitution. But I have never been able to subscribe to the dogma that the Due Process Clause empowers this Court to declare any law, including a rule of evidence, unconstitutional which it believes is contrary to tradition, decency, fundamental justice, or any of the other wide-meaning words used by judges to claim power under the Due Process Clause. See, *e. g., Rochin* v. *California,* 342 U. S. 165. I have an abiding idea that if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution.

With no more authority than the Due Process Clause I am wholly unwilling to tell the state or federal courts that the United States Constitution forbids them to allow courtroom identification without the prosecution's first proving that the identification does not rest in whole or in part on an illegal lineup. Should I do so, I would feel that we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it. That to me would be "judicial activism" at its worst. I would leave the States and Federal Government free to decide their own rules of evidence. That, I believe, is their constitutional prerogative.

I would affirm Wade's conviction.

MR. JUSTICE WHITE, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting in part and concurring in part.

The Court has again propounded a broad constitutional rule barring use of a wide spectrum of relevant and probative evidence, solely because a step in its ascertainment or discovery occurs outside the presence of defense counsel. This was the approach of the Court in *Miranda* v. *Arizona*, 384 U. S. 436. I objected then to what I thought was an uncritical and doctrinaire approach without satisfactory factual foundation. I have much the same view of the present ruling and therefore dissent from the judgment and from Parts II, IV, and V of the Court's opinion.

The Court's opinion is far-reaching. It proceeds first by creating a new *per se* rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment. If he is, the State may not buttress a later courtroom identification of the witness by any reference to the previous identification. Furthermore, the courtroom identification is not admis-

sible at all unless the State can establish by clear and convincing proof that the testimony is not the fruit of the earlier identification made in the absence of defendant's counsel—admittedly a heavy burden for the State and probably an impossible one. To all intents and purposes, courtroom identifications are barred if pretrial identifications have occurred without counsel being present.

The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information. It matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime. The kidnap victim who has lived for days with his abductor is in the same category as the witness who has had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant's counsel being present. The same strictures apply regardless of the number of other witnesses who positively identify the defendant and regardless of the corroborative evidence showing that it was the defendant who had committed the crime.

The premise for the Court's rule is not the general unreliability of eyewitness identifications nor the difficulties inherent in observation, recall, and recognition. The Court assumes a narrower evil as the basis for its rule—improper police suggestion which contributes to erroneous identifications. The Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at all pretrial identifications, in

order to detect recurring instances of police misconduct.[1] I do not share this pervasive distrust of all official investigations. None of the materials the Court relies upon supports it.[2] Certainly, I would bow to solid fact, but the Court quite obviously does not have before it any reliable, comprehensive survey of current police practices on which to base its new rule. Until it does, the Court should avoid excluding relevant evidence from state criminal trials. Cf. *Washington* v. *Texas, ante,* p. 14.

The Court goes beyond assuming that a great majority of the country's police departments are following improper practices at pretrial identifications. To find the lineup a "critical" stage of the proceeding and to exclude identifications made in the absence of counsel, the Court must also assume that police "suggestion," if it occurs at all, leads to erroneous rather than accurate identifications and that reprehensible police conduct will have an unavoidable and largely undiscoverable impact on the trial. This in turn assumes that there is now no adequate source from which defense counsel can learn about the circumstances of the pretrial identification in order to place before the jury all of the considerations which should enter into an appraisal of courtroom identification

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[1] Yet in *Stovall* v. *Denno, post,* p. 293, the Court recognizes that improper police conduct in the identification process has not been so widespread as to justify full retroactivity for its new rule.

[2] In *Miranda* v. *Arizona,* 384 U. S. 436, 449, the Court noted that O'Hara, Fundamentals of Criminal Investigation (1956) is a text that has enjoyed extensive use among law enforcement agencies and among students of police science. The quality of the work was said to rest on the author's long service as observer, lecturer in police science, and work as a federal crime investigator. O'Hara does not suggest that the police should or do use identification machinery improperly; instead he argues for techniques that would increase the reliability of eyewitness identifications, and there is no reason to suggest that O'Hara's views are not shared and practiced by the majority of police departments throughout the land.

evidence. But these are treacherous and unsupported assumptions,[3] resting as they do on the notion that the defendant will not be aware, that the police and the witnesses will forget or prevaricate, that defense counsel will be unable to bring out the truth and that neither jury, judge, nor appellate court is a sufficient safeguard against unacceptable police conduct occurring at a pretrial identification procedure. I am unable to share the Court's view of the willingness of the police and the ordinary citizen-witness to dissemble, either with respect to the identification of the defendant or with respect to the circumstances surrounding a pretrial identification.

There are several striking aspects to the Court's holding. First, the rule does not bar courtroom identifications where there have been no previous identifications in the presence of the police, although when identified in the courtroom, the defendant is known to be in custody and charged with the commission of a crime. Second, the Court seems to say that if suitable legislative standards were adopted for the conduct of pretrial identifications, thereby lessening the hazards in such con-

[3] The instant case and its companions, *Gilbert* v. *California*, *post*, p. 263, and *Stovall* v. *Denno*, *post*, p. 293, certainly lend no support to the Court's assumptions. The police conduct deemed improper by the Court in the three cases seems to have come to light at trial in the ordinary course of events. One can ask what more counsel would have learned at the pretrial identifications that would have been relevant for truth determination at trial. When the Court premises its constitutional rule on police conduct so subtle as to defy description and subsequent disclosure it deals in pure speculation. If police conduct is intentionally veiled, the police will know about it, and I am unwilling to speculate that defense counsel at trial will be unable to reconstruct the known circumstances of the pretrial identification. And if the "unknown" influence on identifications is "innocent," the Court's general premise evaporates and the problem is simply that of the inherent shortcomings of eyewitness testimony.

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frontations, it would not insist on the presence of counsel. But if this is true, why does not the Court simply fashion what it deems to be constitutionally acceptable procedures for the authorities to follow? Certainly the Court is correct in suggesting that the new rule will be wholly inapplicable where police departments themselves have established suitable safeguards.

Third, courtroom identification may be barred, absent counsel at a prior identification, regardless of the extent of counsel's information concerning the circumstances of the previous confrontation between witness and defendant—apparently even if there were recordings or sound-movies of the events as they occurred. But if the rule is premised on the defendant's right to have his counsel know, there seems little basis for not accepting other means to inform. A disinterested observer, recordings, photographs—any one of them would seem adequate to furnish the basis for a meaningful cross-examination of the eyewitness who identifies the defendant in the courtroom.

I share the Court's view that the criminal trial, at the very least, should aim at truthful factfinding, including accurate eyewitness identifications. I doubt, however, on the basis of our present information, that the tragic mistakes which have occurred in criminal trials are as much the product of improper police conduct as they are the consequence of the difficulties inherent in eyewitness testimony and in resolving evidentiary conflicts by court or jury. I doubt that the Court's new rule will obviate these difficulties, or that the situation will be measurably improved by inserting defense counsel into the investigative processes of police departments everywhere.

But, it may be asked, what possible state interest militates against requiring the presence of defense counsel at lineups? After all, the argument goes, he *may* do some good, he *may* upgrade the quality of identification evidence in state courts and he can scarcely do any

harm. Even if true, this is a feeble foundation for fastening an ironclad constitutional rule upon state criminal procedures. Absent some reliably established constitutional violation, the processes by which the States enforce their criminal laws are their own prerogative. The States *do* have an interest in conducting their own affairs, an interest which cannot be displaced simply by saying that there are no valid arguments with respect to the merits of a federal rule emanating from this Court.

Beyond this, however, requiring counsel at pretrial identifications as an invariable rule trenches on other valid state interests. One of them is its concern with the prompt and efficient enforcement of its criminal laws. Identifications frequently take place after arrest but before an indictment is returned or an information is filed. The police may have arrested a suspect on probable cause but may still have the wrong man. Both the suspect and the State have every interest in a prompt identification at that stage, the suspect in order to secure his immediate release and the State because prompt and early identification enhances *accurate* identification and because it must know whether it is on the right investigative track. Unavoidably, however, the absolute rule requiring the presence of counsel will cause significant delay and it may very well result in no pretrial identification at all. Counsel must be appointed and a time arranged convenient for him and the witnesses. Meanwhile, it may be necessary to file charges against the suspect who may then be released on bail, in the federal system very often on his own recognizance, with neither the State nor the defendant having the benefit of a properly conducted identification procedure.

Nor do I think the witnesses themselves can be ignored. They will now be required to be present at the convenience of counsel rather than their own. Many may be much less willing to participate if the identifica-

tion stage is transformed into an adversary proceeding not under the control of a judge. Others may fear for their own safety if their identity is known at an early date, especially when there is no way of knowing until the lineup occurs whether or not the police really have the right man.[4]

Finally, I think the Court's new rule is vulnerable in terms of its own unimpeachable purpose of increasing the reliability of identification testimony.

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.[5] To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must

[4] I would not have thought that the State's interest regarding its sources of identification is any less than its interest in protecting informants, especially those who may aid in identification but who will not be used as witnesses. See *McCray* v. *Illinois*, 386 U. S. 300.

[5] "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U. S. 78, 88. See also *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213; *Alcorta* v. *Texas*, 355 U. S. 28; *Napue* v. *Illinois*, 360 U. S. 264; *Brady* v. *Maryland*, 373 U. S. 83; *Giles* v. *Maryland*, 386 U. S. 66; *Miller* v. *Pate*, 386 U. S. 1.

be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.[6] Our interest in not con-

[6] One point of view about the role of the courtroom lawyer appears in Frank, Courts on Trial 82–83. "What is the role of the lawyers in bringing the evidence before the trial court? As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. . . . If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. Longenecker, in his book *Hints On The Trial of a Law Suit* (a book endorsed by the great Wigmore), in writing of the 'truthful, honest, over-cautious' witness, tells how 'a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness.' The author does not even hint any disapproval of that accomplishment. Longenecker's and other similar books recommend that a lawyer try to prod an irritable but honest 'adverse' witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury. 'You may,' writes Harris, 'sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again.' Taft says that a clever cross-examiner, dealing with an honest but egotistic witness, will 'deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him "hang himself." 'And thus,' adds Taft, 'it may happen that not only is the value of his testimony lost, but the side which produces him

victing the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe [7] but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

I would not extend this system, at least as it presently operates, to police investigations and would not require counsel's presence at pretrial identification procedures. Counsel's interest is in not having his client placed at the scene of the crime, regardless of his whereabouts. Some counsel may advise their clients to refuse to make any

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suffers for seeking aid from such a source'—although, I would add, that may be the only source of evidence of a fact on which the decision will turn.

"'An intimidating manner in putting questions,' writes Wigmore, 'may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value.'"

[7] See the materials collected in c. 3 of Countryman & Finman, The Lawyer in Modern Society; Joint Committee on Continuing Legal Education of American Law Institute and the American Bar Association, The Problem of a Criminal Defense 1–46 (1961); Stovall, Aspects of the Advocate's Dual Responsibility, 22 The Alabama Lawyer 66; Gold, Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer, 14 Clev.-Mar. L. Rev. 65; Symposium on Professional Ethics, 64 Mich. L. Rev. 1469–1498.

movements or to speak any words in a lineup or even to appear in one. To that extent the impact on truthful factfinding is quite obvious. Others will not only observe what occurs and develop possibilities for later cross-examination but will hover over witnesses and begin their cross-examination then, menacing truthful factfinding as thoroughly as the Court fears the police now do. Certainly there is an implicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can. I therefore doubt that the Court's new rule, at least absent some clearly defined limits on counsel's role, will measurably contribute to more reliable pretrial identifications. My fears are that it will have precisely the opposite result. It may well produce fewer convictions, but that is hardly a proper measure of its long-run acceptability. In my view, the State is entitled to investigate and develop its case outside the presence of defense counsel. This includes the right to have private conversations with identification witnesses, just as defense counsel may have his own consultations with these and other witnesses without having the prosecutor present.

Whether today's judgment would be an acceptable exercise of supervisory power over federal courts is another question. But as a constitutional matter, the judgment in this case is erroneous and although I concur in Parts I and III of the Court's opinion I respectfully register this dissent.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

1. I agree with the Court that the exhibition of the person of the accused at a lineup is not itself a violation of the privilege against self-incrimination. In itself, it is no more subject to constitutional objection

than the exhibition of the person of the accused in the courtroom for identification purposes. It is an incident of the State's power to arrest, and a reasonable and justifiable aspect of the State's custody resulting from arrest. It does not require that the accused take affirmative, volitional action, but only that, having been duly arrested he may be seen for identification purposes. It is, however, a "critical stage" in the prosecution, and I agree with the Court that the opportunity to have counsel present must be made available.

2. In my view, however, the accused may not be compelled in a lineup to speak the words uttered by the person who committed the crime. I am confident that it could not be compelled in court. It cannot be compelled in a lineup. It is more than passive, mute assistance to the eyes of the victim or of witnesses. It is the kind of volitional act—the kind of forced cooperation by the accused—which is within the historical perimeter of the privilege against compelled self-incrimination.

Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that. According to the Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the commission of the crime. Presumably this would include, "Your money or your life"—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system.

I completely agree that the accused must be advised of and given the right to counsel before a lineup—and I join in that part of the Court's opinion; but this is an empty right unless we mean to insist upon the accused's fundamental constitutional immunities. One of these is that the accused may not be compelled to speak. To compel him to speak would violate the priv-

ilege against self-incrimination, which is incorporated in the Fifth Amendment.

This great privilege is not merely a shield for the accused. It is also a prescription of technique designed to guide the State's investigation. History teaches us that self-accusation is an unreliable instrument of detection, apt to inculpate the innocent-but-weak and to enable the guilty to escape. But this is not the end of the story. The privilege historically goes to the roots of democratic and religious principle. It prevents the debasement of the citizen which would result from compelling him to "accuse" himself before the power of the state. The roots of the privilege are deeper than the rack and the screw used to extort confessions. They go to the nature of a free man and to his relationship to the state.

An accused cannot be compelled to utter the words spoken by the criminal in the course of the crime. I thoroughly disagree with the Court's statement that such compulsion does not violate the Fifth Amendment. The Court relies upon *Schmerber* v. *California,* 384 U. S. 757 (1966), to support this. I dissented in *Schmerber,* but if it were controlling here, I should, of course, acknowledge its binding effect unless we were prepared to overrule it. But *Schmerber,* which authorized the forced extraction of blood from the veins of an unwilling human being, did not compel the person actively to cooperate—to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime, which, I assume, would be rebuffed by the Court. It is the latter feature which places the compelled utterance by the accused squarely within the history and noble purpose of the Fifth Amendment's commandment.

To permit *Schmerber* to apply in any respect beyond its holding is, in my opinion, indefensible. To permit

its insidious doctrine to extend beyond the invasion of the body, which it permits, to compulsion of the will of a man, is to deny and defy a precious part of our historical faith and to discard one of the most profoundly cherished instruments by which we have established the freedom and dignity of the individual. We should not so alter the balance between the rights of the individual and of the state, achieved over centuries of conflict.

3. While the Court holds that the accused must be advised of and given the right to counsel at the lineup, it makes the privilege meaningless in this important respect. Unless counsel has been waived or, being present, has not objected to the accused's utterance of words used in the course of committing the crime, to compel such an utterance is constitutional error.*

Accordingly, while I join the Court in requiring vacating of the judgment below for a determination as to whether the identification of respondent was based upon factors independent of the lineup, I would do so not only because of the failure to offer counsel before the lineup but also because of the violation of respondent's Fifth Amendment rights.

*While it is conceivable that legislation might provide a meticulous lineup procedure which would *satisfy* constitutional requirements, I do not agree with the Court that this would "remove the basis for regarding the [lineup] stage as 'critical.'"

GILBERT *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 223. Argued February 15–16, 1967.—Decided June 12, 1967.

Petitioner was convicted of armed robbery and the murder of a police officer. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. Petitioner alleges constitutional errors in the admission of testimony of some of the witnesses that they had also identified him at a lineup, which occurred 16 days after his indictment and after appointment of counsel, who was not notified, and in in-court identifications of other witnesses present at that lineup; in the admission of handwriting exemplars taken from him after arrest; and in the admission of a co-defendant's out-of-court statements mentioning petitioner's part in the crimes, which statements were held to have been improperly admitted against the co-defendant on the latter's appeal. Additionally, he alleges violation of his Fourth Amendment rights by police seizure of photographs of him from his locked apartment after a warrantless entry, and the admission of testimony identifying him from these photographs. *Held:*

1. The taking of handwriting exemplars did not violate petitioner's constitutional rights. Pp. 265–267.

(a) The Fifth Amendment privilege against self-incrimination reaches compulsory communications, but a mere handwriting exemplar, in contrast with the content of what is written, is an identifying physical characteristic outside its protection. Pp. 266–267.

(b) The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel; there is minimal risk that the absence of counsel might derogate from his right to a fair trial. P. 267.

2. Petitioner's request for reconsideration of *Delli Paoli* v. *United States*, 352 U. S. 232 (where the Court held that appropriate instructions to the jury would suffice to prevent prejudice to a defendant from references to him in a co-defendant's statement) in connection with his co-defendant's statements, need not be considered in view of the California Supreme Court's holding rejecting the *Delli Paoli* rationale but finding that any error to petitioner by the admission of the statements was harmless. Pp. 267–268.

3. A closer examination of the record than was possible when certiorari was granted reveals that the facts with respect to the search and seizure claim are not sufficiently clear to permit resolution of that question, and certiorari on this issue is vacated as improvidently granted. P. 269.

4. The admission of the in-court identifications of petitioner without first determining that they were not tainted by the illegal lineup procedure but were of independent origin was constitutional error. *United States* v. *Wade*, *ante*, p. 218. Pp. 269–274.

(a) Since the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source, petitioner is entitled only to a vacation of his conviction, pending proceedings in California courts allowing the State to establish that the in-court identifications had an independent source or that their introduction in evidence was harmless error. P. 272.

(b) With respect to testimony of witnesses that they identified petitioner at the lineup, which is a direct result of an illegal procedure, the State is not entitled to show that such testimony had an independent source but the California courts must, unless "able to declare a belief that it was harmless beyond a reasonable doubt," grant petitioner a new trial if such testimony was at the guilt stage, or grant appropriate relief if it was at the penalty stage. Pp. 272–274.

63 Cal. 2d 690, 408 P. 2d 365, vacated and remanded.

Luke McKissack argued the cause and filed briefs for petitioner.

Norman H. Sokolow, Deputy Attorney General of California, and *William E. James*, Assistant Attorney General, argued the cause for respondent. With them on the brief was *Thomas C. Lynch*, Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case was argued with *United States* v. *Wade*, *ante*, p. 218, and presents the same alleged constitutional error in the admission in evidence of in-court identifications there considered. In addition, petitioner alleges con-

stitutional errors in the admission in evidence of testimony of some of the witnesses that they also identified him at the lineup, in the admission of handwriting exemplars taken from him after his arrest, and in the admission of out-of-court statements by King, a co-defendant, mentioning petitioner's part in the crimes, which statements, on the co-defendant's appeal decided with petitioner's, were held to have been improperly admitted against the co-defendant. Finally, he alleges that his Fourth Amendment rights were violated by a police seizure of photographs of him from his locked apartment after entry without a search warrant, and the admission of testimony of witnesses that they identified him from those photographs within hours after the crime.

Petitioner was convicted in the Superior Court of California of the armed robbery of the Mutual Savings and Loan Association of Alhambra and the murder of a police officer who entered during the course of the robbery. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. The California Supreme Court affirmed, 63 Cal. 2d 690, 408 P. 2d 365. We granted certiorari, 384 U. S. 985, and set the case for argument with *Wade* and with *Stovall* v. *Denno*, *post*, p. 293. If our holding today in *Wade* is applied to this case, the issue whether admission of the in-court and lineup identifications is constitutional error which requires a new trial could be resolved on this record only after further proceedings in the California courts. We must therefore first determine whether petitioner's other contentions warrant any greater relief.

I.

The Handwriting Exemplars.

Petitioner was arrested in Philadelphia by an FBI agent and refused to answer questions about the Alham-

bra robbery without the advice of counsel. He later did answer questions of another agent about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during that interrogation gave the agent the handwriting exemplars. They were admitted in evidence at trial over objection that they were obtained in violation of petitioner's Fifth and Sixth Amendment rights. The California Supreme Court upheld admission of the exemplars on the sole ground that petitioner had waived any rights that he might have had not to furnish them. "[The agent] did not tell Gilbert that the exemplars would not be used in any other investigation. Thus, even if Gilbert believed that his exemplars would not be used in California, it does not appear that the authorities improperly induced such belief." 63 Cal. 2d, at 708, 408 P. 2d, at 376. The court did not, therefore, decide petitioner's constitutional claims.

We pass the question of waiver since we conclude that the taking of the exemplars violated none of petitioner's constitutional rights.

First. The taking of the exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers," and not "compulsion which makes a suspect or accused the source of 'real or physical evidence' . . . ." *Schmerber* v. *California,* 384 U. S. 757, 763–764. One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is

written, like the voice or body itself, is an identifying physical characteristic outside its protection. *United States* v. *Wade, supra,* at 222–223. No claim is made that the content of the exemplars was testimonial or communicative matter. Cf. *Boyd* v. *United States,* 116 U. S. 616.

Second. The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. Cf. *United States* v. *Wade, supra.* If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, "the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts." *United States* v. *Wade, supra,* at 227–228.

II.

Admission of Co-Defendant's Statements.

Petitioner contends that he was denied due process of law by the admission during the guilt stage of the trial of his accomplice's pretrial statements to the police which referred to petitioner 159 times in the course of reciting petitioner's role in the robbery and murder. The statements were inadmissible hearsay as to petitioner, and were held on King's aspect of this appeal to be improperly obtained from him and therefore to be inadmissible against him under California law. 63 Cal. 2d, at 699–701, 408 P. 2d, at 370–371.

Petitioner would have us reconsider *Delli Paoli* v. *United States*, 352 U. S. 232 (where the Court held that appropriate instructions to the jury would suffice to prevent prejudice to a defendant from the references to him in a co-defendant's statement), at least as applied to a case, as here, where the co-defendant gained a reversal because of the improper admission of the statements. We have no occasion to pass upon this contention. The California Supreme Court has rejected the *Delli Paoli* rationale, and relying at least in part on the reasoning of the *Delli Paoli* dissent, regards cautionary instructions as inadequate to cure prejudice. *People* v. *Aranda*, 63 Cal. 2d 518, 407 P. 2d 265. The California court applied *Aranda* in this case but held that any error as to Gilbert in the admission of King's statements was harmless. The harmless-error standard applied was that "there is no reasonable possibility that the error in admitting King's statements and testimony might have contributed to Gilbert's conviction," a standard derived by the court from our decision in *Fahy* v. *Connecticut*, 375 U. S. 85.[1] *Fahy* was the basis of our holding in *Chapman* v. *California*, 386 U. S. 18, and the standard applied by the California court satisfies the standard as defined in *Chapman*.

It may be that the California Supreme Court will review the application of its harmless-error standard to King's statements if on the remand the State presses harmless error also in the introduction of the in-court and lineup identifications. However, this at best implies an ultimate application of *Aranda* and only confirms that petitioner's argument for reconsideration of *Delli Paoli* need not be considered at this time.

[1] The California Supreme Court also held that ". . . the erroneous admission of King's statements at the trial on the issue of guilt was not prejudicial on the question of Gilbert's penalty," again citing *Fahy*, 63 Cal. 2d, at 702, 408 P. 2d, at 372.

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III.

The Search-and-Seizure Claim.

The California Supreme Court rejected Gilbert's challenge to the admission of certain photographs taken from his apartment pursuant to a warrantless search. The court justified the entry into the apartment under the circumstances on the basis of so-called "hot pursuit" and "exigent circumstances" exceptions to the warrant requirement. We granted certiorari to consider the important question of the extent to which such exceptions may permit warrantless searches without violation of the Fourth Amendment. A closer examination of the record than was possible when certiorari was granted reveals that the facts do not appear with sufficient clarity to enable us to decide that question. See Appendix to this opinion; compare *Warden* v. *Hayden*, 387 U. S. 294. We therefore vacate certiorari on this issue as improvidently granted. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184.

IV.

The In-court and Lineup Identifications.

Since none of the petitioner's other contentions warrants relief, the issue becomes what relief is required by application to this case of the principles today announced in *United States* v. *Wade, supra.*

Three eyewitnesses to the Alhambra crimes who identified Gilbert at the guilt stage of the trial had observed him at a lineup conducted without notice to his counsel in a Los Angeles auditorium 16 days after his indictment and after appointment of counsel. The manager of the apartment house in which incriminating evidence was found, and in which Gilbert allegedly resided, identified Gilbert in the courtroom and also testified, in substance, to her prior lineup identification on examination by the

State. Eight witnesses who identified him in the courtroom at the penalty stage were not eyewitnesses to the Alhambra crimes but to other robberies allegedly committed by him. In addition to their in-court identifications, these witnesses also testified that they identified Gilbert at the same lineup.

The lineup was on a stage behind bright lights which prevented those in the line from seeing the audience. Upwards of 100 persons were in the audience, each an eyewitness to one of the several robberies charged to Gilbert. The record is otherwise virtually silent as to what occurred at the lineup.[2]

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[2] The record in *Gilbert* v. *United States*, 366 F. 2d 923, involving the federal prosecutions of Gilbert, apparently contains many more details of what occurred at the lineup. The opinion of the Court of Appeals for the Ninth Circuit states, 366 F. 2d, at 935:

"The lineup occurred on March 26, 1964, after Gilbert had been indicted and had obtained counsel. It was held in an auditorium used for that purpose by the Los Angeles police. Some ten to thirteen prisoners were placed on a lighted stage. The witnesses were assembled in a darkened portion of the room, facing the stage and separated from it by a screen. They could see the prisoners but could not be seen by them. State and federal officers were also present and one of them acted as 'moderator' of the proceedings.

"Each man in the lineup was identified by number, but not by name. Each man was required to step forward into a marked circle, to turn, presenting both profiles as well as a face and back view, to walk, to put on or take off certain articles of clothing. When a man's number was called and he was directed to step into the circle, he was asked certain questions: where he was picked up, whether he owned a car, whether, when arrested, he was armed, where he lived. Each was also asked to repeat certain phrases, both in a loud and in a soft voice, phrases that witnesses to the crimes had heard the robbers use: 'Freeze, this is a stickup; this is a holdup; empty your cash drawer; this is a heist; don't anybody move.'

"Either while the men were on the stage, or after they were taken from it, it is not clear which, the assembled witnesses were asked if there were any that they would like to see again, and told that if they had doubts, now was the time to resolve them. Several

At the guilt stage, after the first witness, a cashier of the savings and loan association, identified Gilbert in the courtroom, defense counsel moved, out of the presence of the jury, to strike her testimony on the ground that she identified Gilbert at the pretrial lineup conducted in the absence of counsel in violation of the Sixth Amendment made applicable to the States by the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U. S. 335. He requested a hearing outside the presence of the jury to present evidence supporting his claim that her in-court identification was, and others to be elicited by the State from other eyewitnesses would be, "predicated at least in large part upon their identification or purported identification of Mr. Gilbert at the showup . . . ." The trial judge denied the motion as premature. Defense counsel then elicited the fact of the cashier's lineup identification on cross-examination and again moved to strike her identification testimony. Without passing on the merits of the Sixth Amendment claim, the trial judge denied the motion on the ground that, assuming a violation, it would not in any event entitle Gilbert to suppression of the in-court identification. Defense counsel thereafter elicited the fact of lineup identifications from two other eyewitnesses who on direct examination identified Gilbert in the courtroom. Defense counsel unsuccessfully objected at the penalty stage, to the testimony of the eight witnesses to the other robberies that they identified Gilbert at the lineup.

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gave the numbers of men they wanted to see, including Gilbert's. While the other prisoners were no longer present, Gilbert and 2 or 3 others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other's presence, call out the numbers of men they could identify."

The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. *United States* v. *Wade, supra.* We there held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup. However, as in *Wade,* the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source. Gilbert is therefore entitled only to a vacation of his conviction pending the holding of such proceedings as the California Supreme Court may deem appropriate to afford the State the opportunity to establish that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error.

Quite different considerations are involved as to the admission of the testimony of the manager of the apartment house at the guilt phase and of the eight witnesses at the penalty stage that they identified Gilbert at the lineup.[3] That testimony is the direct result of the illegal

[3] There is a split among the States concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR 2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial. See 5 ALR 2d Later Case Service 1225–1228. That is the Cali-

lineup "come at by exploitation of [the primary] illegality." *Wong Sun* v. *United States,* 371 U. S. 471, 488. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence. Cf. *Mapp* v. *Ohio,* 367 U. S. 643. That conclusion is buttressed by the consideration that the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and

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fornia rule. In *People* v. *Gould,* 54 Cal. 2d 621, 626, 354 P. 2d 865, 867, the Court said:

"Evidence of an extrajudicial identification is admissible, not only to corroborate an identification made at the trial (*People* v. *Slobodion,* 31 Cal. 2d 555, 560 [191 P. 2d 1]), but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached . . . evidence of an extrajudicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. . . . The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination."

New York deals with the subject in a statute. See N. Y. Code Crim. Proc. § 393–b.

seriously aggravate whatever derogation exists of the accused's right to a fair trial. Therefore, unless the California Supreme Court is "able to declare a belief that it was harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U. S. 18, 24, Gilbert will be entitled on remand to a new trial or, if no prejudicial error is found on the guilt stage but only in the penalty stage, to whatever relief California law affords where the penalty stage must be set aside.

The judgment of the California Supreme Court and the conviction are vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE joins this opinion except for Part III, from which he dissents for the reasons expressed in the opinion of MR. JUSTICE DOUGLAS.

APPENDIX TO OPINION OF THE COURT.

Photographs of Gilbert introduced at the guilt stage of the trial had been viewed by eyewitnesses within hours after the robbery and murder. Officers had entered his apartment without a warrant and found them in an envelope on the top of a bedroom dresser. The envelope was of the kind customarily used in delivering developed prints, with the words "Marlboro Photo Studio" imprinted on it. The officers entered the apartment because of information given by an accomplice which led them to believe that one of the suspects might be inside the apartment. Assuming that the warrantless entry into the apartment was justified by the need immediately to search for the suspect, the issue remains whether the subsequent search was reasonably supported by those same exigent circumstances. If the envelope

were come upon in the course of a search for the suspect, the answer might be different from that where it is come upon, even though in plain view, in the course of a general, indiscriminate search of closets, dressers, etc., after it is known that the occupant is absent. Still different considerations may be presented where officers, pursuing the suspect, find that he is absent from the apartment but conduct a limited search for suspicious objects in plain view which might aid in the pursuit. The problem with the record in the present case is that it could reasonably support any of these factual conclusions upon which our constitutional analysis should rest, and the trial court made no findings on the scope of search. The California Supreme Court, which had no more substantial basis upon which to resolve the conflict than this Court, stated that the photos were come upon "while the officers were looking through the apartment for their suspect . . . ." As will appear, a contrary conclusion is equally reasonable.

(1) Agent Schlatter testified that immediately upon entering the apartment which he put at "approximately 1:05," the officers made a quick search for the occupant, which took at most a minute, and that the continued presence of the officers became "a matter of a stake-out under the assumption that the person or persons involved would come back." He testified that the officer who found the photographs, Agent Crowley, had entered the apartment with him. Agent Schlatter's testimony might support the California Supreme Court's view of the scope of search; (2) Agent Crowley testified that he arrived within five minutes *after* Agent Schlatter, "around 1:30, give or take a few minutes either way," that the apartment had already been searched for the suspects, and that he was instructed "to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person

without conducting a detailed search." Crowley's further testimony was that the search, pursuant to which the photos were found, was limited in this manner, and that he merely inspected objects in plain sight which would aid in identification. He stated that a detailed search for guns and money was not conducted until after a warrant had issued over three hours later. (3) Agent Townsend said he arrived at the apartment "sometime between perhaps 1:30 and 2:00," and that "well within an hour" he, Agent Crowley, another agent and a local officer conducted a detailed search of the bedroom. He stated that they "looked through the bedroom closet and dresser and I think . . . the headstand." A substantial sum of money was found in the dresser. Townsend could not "specifically say" whether Crowley was in the bedroom at the time the money was found. This testimony might support a finding that the officers were engaged in a general search of the bedroom at the time the photos were found.

The testimony of the agents concerning their time of arrival in the apartment is not inconsistent with any of the three possible conclusions as to the scope of search. Taking Townsend's testimony together with Crowley's, it can be concluded that the two arrived at about the same time. Agent Schlatter's testimony that Crowley arrived with him at 1:05, however, supports a conclusion that Crowley had begun his activities before Townsend arrived. Then there is the testimony of Agent Kiel, who did not enter the apartment, that he obtained the photos while talking with the landlady "approximately 1:25 to 1:30," about the same time that both Crowley and Townsend testified they arrived. In sum, the testimony concerning the timing of the events surrounding the search is both approximate and itself contradictory.

MR. JUSTICE BLACK, concurring in part and dissenting in part.

Petitioner was convicted of robbery and murder partially on the basis of handwriting samples he had given to the police while he was in custody without counsel and partially on evidence that he had been identified by eyewitnesses at a lineup identification ceremony held by California officers in a Los Angeles auditorium without notice to his counsel. The Court's opinion shows that the officers took Gilbert to the auditorium while he was a prisoner, formed a lineup of Gilbert and other persons, required each one to step forward, asked them certain questions, and required them to repeat certain phrases, while eyewitnesses to this and other crimes looked at them in efforts to identify them as the criminals. At his trial, Gilbert objected to the handwriting samples and to the identification testimony given by witnesses who saw him at the auditorium lineup on the ground that the admission of this evidence would violate his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. It is well-established now that the Fourteenth Amendment makes both the Self Incrimination Clause of the Fifth Amendment and the Right to Counsel Clause of the Sixth Amendment obligatory on the States. See, *e. g.*, *Malloy* v. *Hogan*, 378 U. S. 1; *Gideon* v. *Wainwright*, 372 U. S. 335.

I.

(a) Relying on *Schmerber* v. *California*, 384 U. S. 757, the Court rejects Gilbert's Fifth Amendment contention as to both the handwriting exemplars and the lineup identification. I dissent from that holding. For reasons set out in my separate opinion in *United State* v. *Wade, ante*, p. 243, as well as in my dissent to *Schmerber*, 384 U. S., at 773, I think that case wholly unjustifiably detracts from the protection against compelled self-incrimination

the Fifth Amendment was designed to afford. It rests on the ground that compelling a suspect to submit to or engage in conduct the sole purpose of which is to supply evidence against himself nonetheless does not compel him to be a witness against himself. Compelling a suspect or an accused to be "the source of 'real or physical evidence' . . . ," so says *Schmerber*, 384 U. S., at 764, is not compelling him to be a witness against himself. Such an artificial distinction between things that are in reality the same is in my judgment wholly out of line with the liberal construction which should always be given to the Bill of Rights. See *Boyd* v. *United States*, 116 U. S. 616.

(b) The Court rejects Gilbert's right-to-counsel contention in connection with the handwriting exemplars on the ground that the taking of the exemplars "was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel." In all reality, however, it was one of the most "critical" stages of the government proceedings that ended in Gilbert's conviction. As to both the State's case and Gilbert's defense, the handwriting exemplars were just as important as the lineup and perhaps more so, for handwriting analysis, being, as the Court notes, "scientific" and "systematized," *United States* v. *Wade, ante*, at 227, may carry much more weight with the jury than any kind of lineup identification. The Court, however, suggests that absence of counsel when handwriting exemplars are obtained will not impair the right of cross-examination at trial. But just as nothing said in our previous opinions "links the right to counsel only to protection of Fifth Amendment rights," *United States* v. *Wade, ante*, at 226, nothing has been said which justifies linking the right to counsel only to the protection of other Sixth Amendment rights. And there is nothing in the Constitution to justify considering the right to counsel as a second-

class, subsidiary right which attaches only when the Court deems other specific rights in jeopardy. The real basis for the Court's holding that the stage of obtaining handwriting exemplars is not "critical," is its statement that "there is minimal risk that the absence of counsel might derogate from his right to a fair trial." The Court considers the "right to a fair trial" to be the overriding "aim of the right to counsel," *United States* v. *Wade, ante,* at 226, and somehow believes that this Court has the power to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a "fair trial." But I think this Court lacks constitutional power thus to balance away a defendant's absolute right to counsel which the Sixth and Fourteenth Amendments guarantee him. The Framers did not declare in the Sixth Amendment that a defendant is entitled to a "fair trial," nor that he is entitled to counsel on the condition that this Court thinks there is more than a "minimal risk" that without a lawyer his trial will be "unfair." The Sixth Amendment settled that a trial without a lawyer is constitutionally unfair, unless the court-created balancing formula has somehow changed it. *Johnson* v. *Zerbst,* 304 U. S. 458, and *Gideon* v. *Wainwright,* 372 U. S. 335, I thought finally established the right of an accused to counsel without balancing of any kind.

The Court's holding here illustrates the danger to Bill of Rights guarantees in the use of words like a "fair trial" to take the place of the clearly specified safeguards of the Constitution. I think it far safer for constitutional rights for this Court to adhere to constitutional language like "the accused shall . . . have the Assistance of Counsel for his defence" instead of substituting the words not mentioned, "the accused shall have the assistance of counsel only if the Supreme Court thinks it necessary to assure a fair trial." In my judgment the guarantees

of the Constitution with its Bill of Rights provide the kind of "fair trial" the Framers sought to protect. Gilbert was entitled to have the "assistance of counsel" when he was forced to supply evidence for the Government to use against him at his trial. I would reverse the case for this reason also.

II.

I agree with the Court that Gilbert's case should not be reversed for state error in admitting the pretrial statements of an accomplice which referred to Gilbert. But instead of squarely rejecting petitioner's reliance on the dissent in *Delli Paoli* v. *United States,* 352 U. S. 232, 246, the Court avoids the issue by pointing to the fact that the California Supreme Court, even assuming the error to be a federal constitutional one, applied a harmless-error test which measures up to the one we subsequently enunciated in *Chapman* v. *California,* 386 U. S. 18. And the Court then goes on to suggest that the California Supreme Court may desire to reconsider whether that is so upon remand.

I think the Court should clearly indicate that neither *Delli Paoli* nor *Chapman* has any relevance here. *Delli Paoli* rested on the admissibility of evidence in federal, not state, courts. The introduction of evidence in state courts is exclusively governed by state law unless its introduction would violate some federal constitutional provision and there is no such federal provision here. See *Spencer* v. *Texas,* 385 U. S. 554. That being so, any error in admitting the accomplice's pretrial statements is only an error of state law, and *Chapman,* providing a federal constitutional harmless-error rule, has absolutely no relevance here. Instead of looking at the harmless-error test applied by the California Supreme Court in order to ascertain whether it comports with *Chapman,* I would make it clear that this Court is leaving to the

States their unbridled power to control their own state courts in the absence of conflicting federal constitutional provisions.

III.

One witness who identified Gilbert at the guilt stage of his trial and eight witnesses who identified him at the penalty stage testified on direct examination that they had identified him in the auditorium lineup. I agree with the Court that the admission of this testimony was constitutional error and that Gilbert is entitled to a new trial unless the state courts, applying *Chapman*, conclude that this error was harmless. However, these witnesses also identified Gilbert in the courtroom and two other witnesses at the guilt stage identified him solely in the courtroom. As to these, the Court holds that "[t]he admission of the in-court identifications without first determining that they were not tainted by the illegal lineup . . . was constitutional error." I dissent from this holding in this case and in *United States* v. *Wade*, *ante*, p. 243, for the reasons there given.

For the reasons here stated, I would vacate the judgment of the California Supreme Court and remand for consideration of whether the admission of the handwriting exemplars and the out-of-court lineup identification was harmless error.*

MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

While I agree with the Court's opinion except for Part I,† I would reverse and remand for a new trial on

*The Court dismisses as improvidently granted the Fourth Amendment search-and-seizure question raised by Gilbert in this case. I dissent from this, because I would decide that question against Gilbert. However, since the Court refuses to decide that question, I see no reason for expressing my views at length.

† On that phase of the case I agree with MR. JUSTICE BLACK and MR. JUSTICE FORTAS.

the search and seizure point. The search of the petitioner's home is sought to be justified by the doctrine of "hot pursuit," even though the officers conducting the search knew that petitioner, the suspected criminal, was not at home.

At about 10:30 a. m. on January 3, 1964, a California bank was robbed by two armed men; a police officer was killed by one of the robbers. Another officer shot one of the robbers, Weaver, who was captured a few blocks from the scene of the crime. Weaver told the police that he had participated in the robbery and that a person known to him as "Skinny" Gilbert was his accomplice. He told the officers that Gilbert lived in Apartment 28 of "a Hawaiian sounding named apartment house" on Los Feliz Boulevard. This information was given to the Federal Bureau of Investigation and was broadcast to a field agent, Kiel, who was instructed to find the apartment. Kiel located the "Lanai," an apartment on Los Feliz Boulevard, at about 1 p. m., informed the radio control, and engaged the apartment manager in conversation. While they were talking, a man gave a key to the manager and told her that he was going to San Francisco for a few days. Agent Kiel learned from the manager that Flood, one of the two men who had rented Apartment 28 the previous day, was the man who had just turned in the key and left by the rear exit. The agent ran out into the alleyway but saw no one.

In the meantime, the federal officers learned from Weaver that Gilbert was registered under the name of Flood. They also learned that three men may have been involved in the robbery—the two who entered the bank and a third driving the getaway car. About 1:10 p. m., additional federal agents arrived at the apartment, in response to Agent Kiel's radio summons. Kiel told them that the resident of Apartment 28 was a Robert Flood who had just left. The agents obtained a key from the

manager, entered the apartment and searched for a person or a hiding place for a person. They found no one. But they did find an envelope containing pictures of petitioner; the pictures were seized and shown to bank employees for identification. The agents also found a notebook containing a diagram of the area surrounding the bank, a clip from an automatic pistol, and a bag containing rolls of coins bearing the marking of the robbed bank. On the basis of this information, a search warrant was issued, and the automatic clip, notebook, and coin rolls were seized. Petitioner was arrested in Pennsylvania on February 26. The items seized during the search of his apartment were introduced in evidence at his trial for murder.

The California Supreme Court justified the search on the ground that the police were in hot pursuit of the suspected bank robbers. The entry of the apartment was lawful. The subsequent search and seizure was lawful since the officers were trying to further identify suspects and to facilitate continued pursuit. 63 Cal. 2d 690, 408 P. 2d 365.

I have set forth the testimony relating to the search more fully in the Appendix to this opinion. For the reasons stated there, I cannot agree that "the facts do not appear with sufficient clarity to enable us to decide" the serious question presented.

Since the search and seizure took place without a warrant, it can stand only if it comes within one of the narrowly defined exceptions to the rule that a search and seizure must rest upon a validly executed search warrant. See, *e. g.*, *United States* v. *Jeffers*, 342 U. S. 48, 51; *Jones* v. *United States*, 357 U. S. 493; *Rios* v. *United States*, 364 U. S. 253, 261; *Stoner* v. *California*, 376 U. S. 483, 486. One of these exceptions is that officers having probable cause to arrest may enter a dwelling to make the arrest and conduct a contemporaneous

search of the place of arrest "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody." *Agnello* v. *United States*, 269 U. S. 20, 30. This, of course, assumes that an arrest has been made, and that the search "is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." *Stoner* v. *California, supra*, at 486. In this case, the exemption is not applicable since the arrest was made many days after the search and at a location far removed from the search.

Here, the officers entered the apartment, searched for petitioner and did not find him. Nevertheless, they continued searching the apartment and seized the pictures; the inescapable conclusion is that they were searching for evidence linking petitioner to the bank robbery, not for the suspected robbers. The court below said that, having legally entered the apartment, the officers "could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit." 63 Cal. 2d, at 707, 408 P. 2d, at 375.

Prior to this case, police could enter and search a house without a warrant only incidental to a valid arrest. If this judgment stands, the police can search a house for evidence, even though the suspect is not arrested. The purpose of the search is, in the words of the California Supreme Court, "limited to and incident to the purpose of the officers' entry"—that is, to apprehend the suspected criminal. Under that doctrine, the police are given license to search for any evidence linking the homeowner with the crime. Certainly such evidence is well calculated "to identify the suspects," and will "expedite the pursuit" since the police can then concentrate on the person whose home has been ransacked. *Ibid.*

The search and seizure in this case violates another limitation, which concededly the ill-starred decision in *Harris* v. *United States,* 331 U. S. 145, flouted, *viz.,* that a general search for evidence, even when the police are in "hot pursuit" or have a warrant of arrest, does not make constitutional a general search of a room or of a house (*United States* v. *Lefkowitz,* 285 U. S. 452, 463–464). If it did, then the police, acting without a search warrant, could search more extensively than when they have a warrant. For the warrant must, as prescribed by the Fourth Amendment, "particularly" describe the "things to be seized." As stated by the Court in *United States* v. *Lefkowitz, supra,* at 464:

> "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

Indeed, if at the very start, there had been a search warrant authorizing the seizure of the automatic clip, notebook, and coin rolls, the envelope containing pictures of petitioner could not have been seized. "The requirement that warrants shall particularly describe the things

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to be seized . . . prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States,* 275 U. S. 192, 196.

The modern police technique of ransacking houses, even to the point of seizing their entire contents as was done in *Kremen* v. *United States,* 353 U. S. 346, is a shocking departure from the philosophy of the Fourth Amendment. For the kind of search conducted here was indeed a general search. And if the Fourth Amendment was aimed at any particular target it was aimed at that. When we take that step, we resurrect one of the deepest-rooted complaints that gave rise to our Revolution. As the Court stated in *Boyd* v. *United States,* 116 U. S. 616, 625:

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' "

I would not allow the general search to reappear on the American scene.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

As the Court notes, there is some confusion in the record respecting the timing of events surrounding the search and the breadth of purpose with which the search was conducted. The confusion results from the testimony of the agents involved.

Agent Kiel testified that Agents Schlatter and Onsgaard arrived at the apartment at about 1:10 and entered the apartment a minute or two after their arrival. Kiel received the photographs from Agent Schlatter between 1:25 and 1:30.

Agent Schlatter testified that he, Agent Onsgaard and some local police arrived at the apartment about 1:05 and that Agent Crowley and one or two local police officers arrived in another car at the same time. Schlatter briefly talked to Kiel and the apartment manager and then entered the apartment. Upon entering he saw no one. He "made a very fast search of the apartment for a person or a hiding place of a person and . . . found none." This search took "a matter of seconds or a minute at the outside" and "[a]fter we had searched for [a] person or persons, and no one was there, it then became a matter of a stake-out under the assumption that the person or persons involved would come back." It seemed to Schlatter that "an agent had [the photograph] in his hand," when he first saw it, that it "was in the hands of an agent or an officer," and Schlatter had "a vague recollection that [the agent or officer told him he had found it] in the bedroom . . . ." There were a number of photographs. Schlatter took the photographs out to Kiel and instructed him to take one of them to the savings and loan association and see if anyone there could recognize the photograph. Schlatter testified that he was in the apartment for about 30 minutes after making the search and left other agents behind when he left.

Agent Crowley testified that he entered the apartment "around 1:30, give or take a few minutes either way" and that he would say that the other officers had been in the apartment less than five minutes before he entered. He believed that "the officers and the other agent who had been with [him] at the rear of the building when the first entry was made, entered with [him]." When Crowley entered the apartment it "had already been searched for people." He received "instructions . . . to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person without conducting a detailed search." In the bedroom, on the dresser, Crowley saw an envelope bearing the name "Marlboro Photo Studio"; it appeared to him to be an envelope containing photos and he could see that there was something inside. Crowley opened the envelope and saw several copies of photographs. He discussed the matter with "Onsgaard who was in charge in the building and he instructed [Crowley] to give it to another agent for him to utilize in pursuing the investigation, and [he was] reasonably certain that that agent was Mr. Schlatter." This was about 1:30 according to Crowley. In the course of his search which turned up the photographs, Crowley "turned over [items] to see what was on the reverse, such as business cards, sales slips from local stores, that sort of item which might have been folded and would appear to possibly contain information of value to pursuit." He relayed the information obtained in this manner to the man coordinating the operation. Crowley remained in the apartment until the next morning.

Agent Townsend testified that he arrived at the apartment "[s]ometime between perhaps 1:30 and 2:00." Within an hour of his arrival, he began a search. Townsend testified that he, Agent Crowley, another agent and a local officer "looked through the bedroom closet and

the dresser and I think the headstand." This was after it was known that no one, other than agents and police officers, was in the apartment. Townsend stated that the agents and officers were "[i]n and out of the bedroom," that he found money in the bedroom dresser about an hour after he arrived in the apartment, and that he could not "say specifically" whether Crowley was there at that time.

Thus, there is some conflict regarding the times at which the events took place and with respect to the nature of the searches conducted by the various officers. The way I read the record, however, it is not in such a state "that the facts do not appear with sufficient clarity to enable us to decide" the question presented. Crowley's testimony that he came upon the photographs while searching "for anything . . . that we could use to identify or continue the pursuit" stands uncontradicted, as does his testimony that the apartment had already been searched for a person prior to his search uncovering the photographs. Schlatter's testimony that the operation "became a matter of a stake-out" after the unsuccessful search for a person does not contradict Crowley's testimony. A search for identifying evidence is certainly compatible with a "stake-out." And Crowley best knew what he was doing when he discovered the photographs. Nor does Townsend's testimony that he and others, perhaps including Crowley, conducted a detailed search conflict with Crowley's testimony. First, the record indicates that the detailed search was conducted after the photographs had been found. According to the testimony of Kiel and Schlatter, Schlatter gave the photographs to Kiel at about 1:30; according to Townsend, he arrived sometime between 1:30 and 2. Second, even if the detailed search took place before Crowley found the photographs and Crowley participated in that search, that does not indicate that Crowley's search which turned

up the photographs was more limited than Crowley claimed. If anything, it would indicate that his search was more general than he stated. Finally, Townsend's testimony as to the general search does not conflict with Schlatter's testimony that the operation became a "stake-out" after the suspect was not found. As I have said, a "stake-out" does not preclude a detailed search for evidence. And, the record indicates that Schlatter was not in the apartment when Townsend and the others conducted the detailed search.

The way I read the record, the photographs were discovered in the course of a general search for evidence. But even if Crowley is not believed and his testimony relating to the nature of his search is thrown out and it is simply assumed that he came upon the envelope in the course of a search for the suspect, there was no reason to pry into the envelope and seize the pictures—other than to obtain evidence. An envelope would contain neither the suspect nor the weapon.

MR. JUSTICE WHITE, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

I concur in Parts I, II, and III of the Court's opinion, but for the reasons stated in my separate opinion in *United States* v. *Wade, ante,* p. 250, I dissent from Part IV of the Court's opinion and would therefore affirm the judgment of the Supreme Court of California.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I concur in the result—the vacation of the judgment of the California Supreme Court and the remand of the case—but I do not believe that it is adequate. I would reverse and remand for a new trial on the additional ground that petitioner was entitled by the Sixth and

Fourteenth Amendments to be advised that he had a right to counsel before and in connection with his response to the prosecutor's demand for a handwriting exemplar.

1. The giving of a handwriting exemplar is a "critical stage" of the proceeding, as my Brother BLACK states. It is a "critical stage" as much as is a lineup. See *United States* v. *Wade, ante,* p. 218. Depending upon circumstances, both may be inoffensive to the Constitution, totally fair to the accused, and entirely reliable for the administration of justice. On the other hand, each may be constitutionally offensive, totally unfair to the accused, and prejudicial to the ascertainment of truth. An accused whose handwriting exemplar is sought needs counsel: Is he to write "Your money or your life?" Is he to emulate the holdup note by using red ink, brown paper, large letters, etc.? Is the demanded handwriting exemplar, in effect, an inculpation—a confession? Cf. the eloquent arguments as to the need for counsel, in the Court's opinion in *United States* v. *Wade, supra.*

2. The Court today appears to hold that an accused may be compelled to give a handwriting exemplar. Cf. *Schmerber* v. *California,* 384 U. S. 757 (1966). Presumably, he may be punished if he adamantly refuses. Unlike blood, handwriting cannot be extracted by a doctor from an accused's veins while the accused is subjected to physical restraint, which *Schmerber* permits. So presumably, on the basis of the Court's decision, trial courts may hold an accused in contempt and keep him in jail—indefinitely—until he gives a handwriting exemplar.

This decision goes beyond *Schmerber.* Here the accused, in the absence of any warning that he has a right to counsel, is compelled to cooperate, not merely to submit; to engage in a volitional act, not merely to suffer the inevitable consequences of arrest and state custody; to take affirmative action which may not merely identify

him, but tie him directly to the crime. I dissented in *Schmerber*. For reasons stated in my separate opinion in *United States* v. *Wade, supra,* I regard the extension of *Schmerber* as impermissible.

In *Wade,* the accused, who is compelled to utter the words used by the criminal in the heat of his act, has at least the comfort of counsel—even if the Court denies that the accused may refuse to speak the words—because the compelled utterance occurs in the course of a lineup. In the present case, the Court deprives him of even this source of comfort and whatever protection counsel's ingenuity could provide in face of the Court's opinion. This is utterly insupportable, in my respectful opinion. This is not like fingerprinting, measuring, photographing—or even blood-taking. It is a process involving the use of discretion. It is capable of abuse. It is in the stream of inculpation. Cross-examination can play only a limited role in offsetting false inference or misleading coincidence from a "stacked" handwriting exemplar. The Court's reference to the efficacy of cross-examination in this situation is much more of a comfort to an appellate court than a source of solace to the defendant and his counsel.

3. I agree with the Court's condemnation of the lineup identifications here and the consequent in-court identifications, and I join in this part of its opinion. I would also reverse and remand for a new trial because of the use of the handwriting exemplars which were unconstitutionally obtained in the absence of advice to the accused as to the availability of counsel. I could not conclude that the violation of the privilege against self-incrimination implicit in the facts relating to the exemplars was waived in the absence of advice as to counsel. *In re Gault,* 387 U. S. 1, 41–42 (1967); *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

Syllabus.

STOVALL *v.* DENNO, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 254. Argued February 16, 1967.—Decided June 12, 1967.

Petitioner was convicted and sentenced to death for murdering one Dr. Behrendt. He had been arrested the day after the murder and without being afforded time to retain counsel was taken by police officers, to one of whom he was handcuffed, to be viewed at the hospital by Mrs. Behrendt, who had been seriously wounded by her husband's assailant. After observing him and hearing him speak as directed by an officer, Mrs. Behrendt identified petitioner as the murderer. Mrs. Behrendt and the officers testified at petitioner's trial as to the hospital identification and she also made an in-court identification of the petitioner. Following affirmance of his conviction by the highest state court, petitioner sought habeas corpus in the District Court claiming that Mrs. Behrendt's identification testimony violated his Fifth, Sixth, and Fourteenth Amendment rights. The District Court after hearing argument on an unrelated claim dismissed the petition. The Court of Appeals, *en banc*, vacated a panel decision reversing the dismissal of the petition on constitutional grounds, and affirmed the District Court. *Held:*

1. The constitutional rule established in today's decisions in *United States* v. *Wade* and *Gilbert* v. *California*, *ante*, pp. 218, 263, has application only to cases involving confrontations for identification purposes conducted in the absence of counsel after this date. Cf. *Linkletter* v. *Walker*, 381 U. S. 618; *Tehan* v. *Shott*, 382 U. S. 406; *Johnson* v. *New Jersey*, 384 U. S. 719. Pp. 296–301.

2. Though the practice of showing suspects singly for purposes of identification has been widely condemned, a violation of due process of law in the conduct of a confrontation depends on the totality of the surrounding circumstances. There was no due process denial in the confrontation here since Mrs. Behrendt was the only person who could exonerate the suspect; she could not go to the police station for the usual lineup; and there was no way of knowing how long she would live. Pp. 301–302.

355 F. 2d 731, affirmed.

Leon B. Polsky argued the cause and filed briefs for petitioner.

William Cahn argued the cause and filed a brief for respondent.

H. Richard Uviller argued the cause and filed a brief for the New York State District Attorneys' Association, as *amicus curiae*, urging affirmance.

Louis J. Lefkowitz, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Barry Mahoney*, Assistant Attorney General, filed a brief for the Attorney General of New York, as *amicus curiae*, urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This federal habeas corpus proceeding attacks collaterally a state criminal conviction for the same alleged constitutional errors in the admission of allegedly tainted identification evidence that were before us on direct review of the convictions involved in *United States* v. *Wade*, *ante*, p. 218, and *Gilbert* v. *California*, *ante*, p. 263. This case therefore provides a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively. See *Linkletter* v. *Walker*, 381 U. S. 618; *Tehan* v. *Shott*, 382 U. S. 406; *Johnson* v. *New Jersey*, 384 U. S. 719.[1] A further question is whether in any event, on the facts of the particular con-

[1] Although respondent did not raise the bar of retroactivity, the Attorney General of the State of New York, as *amicus curiae*, extensively briefed the issue of retroactivity and petitioner, in his reply brief, addressed himself to this question. Compare *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3.

frontation involved in this case, petitioner was denied due process of law in violation of the Fourteenth Amendment. Cf. *Davis* v. *North Carolina,* 384 U. S. 737.

Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island, about midnight August 23, 1961. Dr. Behrendt's wife, also a physician, had followed her husband to the kitchen and jumped at the assailant. He knocked her to the floor and stabbed her 11 times. The police found a shirt on the kitchen floor and keys in a pocket which they traced to petitioner. They arrested him on the afternoon of August 24. An arraignment was promptly held but was postponed until petitioner could retain counsel.

Mrs. Behrendt was hospitalized for major surgery to save her life. The police, without affording petitioner time to retain counsel, arranged with her surgeon to permit them to bring petitioner to her hospital room about noon of August 25, the day after the surgery. Petitioner was handcuffed to one of five police officers who, with two members of the staff of the District Attorney, brought him to the hospital room. Petitioner was the only Negro in the room. Mrs. Behrendt identified him from her hospital bed after being asked by an officer whether he "was the man" and after petitioner repeated at the direction of an officer a "few words for voice identification." None of the witnesses could recall the words that were used. Mrs. Behrendt and the officers testified at the trial to her identification of the petitioner in the hospital room, and she also made an in-court identification of petitioner in the courtroom.

Petitioner was convicted and sentenced to death. The New York Court of Appeals affirmed without opinion. 13 N. Y. 2d 1094, 196 N. E. 2d 65. Petitioner *pro se* sought federal habeas corpus in the District Court for the Southern District of New York. He claimed that among other constitutional rights allegedly denied him

at his trial, the admission of Mrs. Behrendt's identification testimony violated his rights under the Fifth, Sixth, and Fourteenth Amendments because he had been compelled to submit to the hospital room confrontation without the help of counsel and under circumstances which unfairly focused the witness' attention on him as the man believed by the police to be the guilty person. The District Court dismissed the petition after hearing argument on an unrelated claim of an alleged invalid search and seizure. On appeal to the Court of Appeals for the Second Circuit a panel of that court initially reversed the dismissal after reaching the issue of the admissibility of Mrs. Behrendt's identification evidence and holding it inadmissible on the ground that the hospital room identification violated petitioner's constitutional right to the assistance of counsel. The Court of Appeals thereafter heard the case *en banc*, vacated the panel decision, and affirmed the District Court. 355 F. 2d 731. We granted certiorari, 384 U. S. 1000, and set the case for argument with *Wade* and *Gilbert*. We hold that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date. The rulings of *Wade* and *Gilbert* are therefore inapplicable in the present case. We think also that on the facts of this case petitioner was not deprived of due process of law in violation of the Fourteenth Amendment. The judgment of the Court of Appeals is, therefore, affirmed.

I.

Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. *Linkletter* v. *Walker, supra; Tehan* v. *Shott, supra; Johnson* v. *New Jersey, supra.* "These cases establish the principle that in criminal litigation concerning constitutional

claims, 'the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application' . . . ." *Johnson, supra,* 384 U. S., at 726–727. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson, supra,* at 728.

Wade and *Gilbert* fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel. A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so.

It is true that the right to the assistance of counsel has been applied retroactively at stages of the prosecution where denial of the right must almost invariably deny a fair trial, for example, at the trial itself, *Gideon* v. *Wainwright,* 372 U. S. 335, or at some forms of arraignment, *Hamilton* v. *Alabama,* 368 U. S. 52, or on appeal, *Douglas* v. *California,* 372 U. S. 353. "The basic pur-

pose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *Shott, supra,* at 416. We have also retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. See for example *Jackson* v. *Denno,* 378 U. S. 368. Although the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson* v. *New Jersey, supra,* at 728–729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities." 384 U. S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.

We have outlined in *Wade* the dangers and unfairness inherent in confrontations for identification. The possibility of unfairness at that point is great, both because of the manner in which confrontations are frequently conducted, and because of the likelihood that the accused will often be precluded from reconstructing what occurred and thereby from obtaining a full hearing on the identification issue at trial. The presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. We have, therefore, concluded that the confrontation is a "critical stage," and that counsel is required at all confrontations. It must be recognized, however, that, unlike

cases in which counsel is absent at trial or on appeal, it may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial. Therefore, while we feel that the exclusionary rules set forth in *Wade* and *Gilbert* are justified by the need to assure the integrity and reliability of our system of justice, they undoubtedly will affect cases in which no unfairness will be present. Of course, we should also assume there have been injustices in the past which could have been averted by having counsel present at the confrontation for identification, just as there are injustices when counsel is absent at trial. But the certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application, especially in light of the strong countervailing interests outlined below, and because it remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law. See *Palmer* v. *Peyton*, 359 F. 2d 199 (C. A. 4th Cir. 1966).

The unusual force of the countervailing considerations strengthens our conclusion in favor of prospective application. The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification. Today's rulings were not foreshadowed in our cases; no court announced such a requirement until *Wade* was decided by the Court of Appeals for the Fifth Circuit, 358 F. 2d 557. The overwhelming majority of American courts have always treated the evidence ques-

tion not as one of admissibility but as one of credibility for the jury. Wall, Eye-Witness Identification in Criminal Cases 38. Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel. It is, therefore, very clear that retroactive application of *Wade* and *Gilbert* "would seriously disrupt the administration of our criminal laws." *Johnson* v. *New Jersey, supra,* at 731. In *Tehan* v. *Shott, supra,* we thought it persuasive against retroactive application of the no-comment rule of *Griffin* v. *California,* 380 U. S. 609, that such application would have a serious impact on the six States that allowed comment on an accused's failure to take the stand. We said, "To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration." 382 U. S., at 419. That impact is insignificant compared to the impact to be expected from retroactivity of the *Wade* and *Gilbert* rules. At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine taint, if any, in identification evidence, and whether in any event the admission of the evidence was harmless error. Doubtless, too, inquiry would be handicapped by the unavailability of witnesses and dim memories. We conclude, therefore, that the *Wade* and *Gilbert* rules should not be made retroactive.

We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction

unsupportable.[2] We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies,[3] and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law,[4] militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue.[5] But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

II.

We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this

[2] Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 22 Record of N. Y. C. B. A. 394, 408–411 (1967).

[3] Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907, 930–933 (1962).

[4] See Mishkin, Foreword, The Supreme Court 1964 Term, 79 Harv. L. Rev. 56, 60–61 (1965).

[5] See Mishkin, n. 4, *supra*, at 61, n. 23; Bender, The Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650, 675–678 (1962); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 764 (1966).

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case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer* v. *Peyton*, 359 F. 2d 199 (C. A. 4th Cir. 1966). The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.[6] However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative. The Court of Appeals, *en banc*, stated, 355 F. 2d, at 735,

> "Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question."

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS is of the view that the deprivation of the right to counsel in the setting of this case

[6] See Wall, Eye-Witness Identification in Criminal Cases 26–40; Paul, Identification of Accused Persons, 12 Austl. L. J. 42, 44 (1938);

should be given retroactive effect as it was in *Gideon* v. *Wainwright*, 372 U. S. 335, and in *Douglas* v. *California*, 372 U. S. 353. And see *Linkletter* v. *Walker*, 381 U. S. 618, 640 (dissenting opinion); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (dissenting opinion).

MR. JUSTICE FORTAS would reverse and remand for a new trial on the ground that the State's reference at trial to the improper hospital identification violated petitioner's Fourteenth Amendment rights and was prejudicial. He would not reach the question of retroactivity of *Wade* and *Gilbert*.

MR. JUSTICE WHITE, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join.

For the reasons stated in my separate opinion in *United States* v. *Wade*, *ante*, p. 250, I perceive no constitutional error in the identification procedure to which the petitioner was subjected. I concur in the result and in that portion of the Court's opinion which limits application of the new Sixth Amendment rule.

MR. JUSTICE BLACK, dissenting.

In *United States* v. *Wade*, *ante*, p. 218, and *Gilbert* v. *California*, *ante*, p. 263, the Court holds that lineup identification testimony should be excluded if it was obtained by exhibiting an accused to identifying witnesses before trial in the absence of his counsel. I concurred in part in those holdings as to out-of-court lineup identification on the ground that the right to counsel is guaranteed in federal courts by the Sixth Amendment and in state courts by the Sixth and Fourteenth Amendments. The first question in this case is whether other defendants, already in prison on

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Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 480–481; Frankfurter, The Case of Sacco and Vanzetti 31–32.

such unconstitutional evidence, shall be accorded the benefit of the rule. In this case the Court holds that the petitioner here, convicted on such unconstitutional evidence, must remain in prison, and that besides Wade and Gilbert, who are "chance beneficiaries," no one can invoke the rule except defendants exhibited in lineups in the future. I dissent from that holding. It keeps people serving sentences who were convicted through the use of unconstitutional evidence. This is sought to be justified on the ground that retroactive application of the holding in *Gilbert* and *Wade* would somehow work a "burden on the administration of justice" and would not serve the Court's purpose "to deter law enforcement authorities." It seems to me that to deny this petitioner and others like him the benefit of the new rule deprives them of a constitutional trial and perpetrates a rank discrimination against them. Once the Court determines what the Constitution says, I do not believe it has the power, by weighing "countervailing interests," to legislate a timetable by which the Constitution's provisions shall become effective. For reasons stated in my dissent in *Linkletter* v. *Walker*, 381 U. S. 618, 640, I would hold that the petitioner here and every other person in jail under convictions based on unconstitutional evidence should be given the advantage of today's newly announced constitutional rules.

The Court goes on, however, to hold that even though its new constitutional rule about the Sixth Amendment's right to counsel cannot help this petitioner, he is nevertheless entitled to a consideration of his claim, "independent of any right to counsel claim," that his identification by one of the victims of the robbery was made under circumstances so "unfair" that he was denied "due process of law" guaranteed by the Fourteenth Amendment. Although the Court finds petitioner's claim without merit, I dissent from its holding that a general

claim of "unfairness" at the lineup is "open to all persons to allege and prove." The term "due process of law" is a direct descendant of Magna Charta's promise of a trial according to the "law of the land" as it has been established by the lawmaking agency, constitutional or legislative. No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended that the Due Process Clause of the Fifth or Fourteenth Amendment was designed to mean any more than that defendants charged with crimes should be entitled to a trial governed by the laws, constitutional and statutory, that are in existence at the time of the commission of the crime and the time of the trial. The concept of due process under which the Court purports to decide this question, however, is that this Court looks at "the totality of the circumstances" of a particular case to determine in its own judgment whether they comport with the Court's notions of decency, fairness, and fundamental justice, and, if so, declares they comport with the Constitution, and, if not, declares they are forbidden by the Constitution. See, *e. g., Rochin* v. *California,* 342 U. S. 165. Such a constitutional formula substitutes this Court's judgment of what is right for what the Constitution declares shall be the supreme law of the land. This due process notion proceeds as though our written Constitution, designed to grant limited powers to government, had neutralized its limitations by using the Due Process Clause to authorize this Court to override its written limiting language by substituting the Court's view of what powers the Framers should have granted government. Once again I dissent from any such view of the Constitution. Where accepted, its result is to make this Court not a Constitution-interpreter, but a day-to-day Constitution-maker.

But even if the Due Process Clause could possibly be construed as giving such latitudinarian powers to the

Court, I would still think the Court goes too far in holding that the courts can look at the particular circumstances of each identification lineup to determine at large whether they are too "suggestive and conducive to irreparable mistaken identification" to be constitutional. That result is to freeze as constitutional or as unconstitutional the circumstances of each case, giving the States and the Federal Government no permanent constitutional standards. It also transfers to this Court power to determine what the Constitution should say, instead of performance of its undoubted constitutional power to determine what the Constitution does say. And the result in this particular case is to put into a constitutional mould a rule of evidence which I think is plainly within the constitutional powers of the States in creating and enforcing their own criminal laws. I must say with all deference that for this Court to hold that the Due Process Clause gives it power to bar state introduction of lineup testimony on its notion of fairness, not because it violates some specific constitutional prohibition, is an arbitrary, wholly capricious action.

I would not affirm this case but would reverse and remand for consideration of whether the out-of-court lineup identification of petitioner was, under *Chapman* v. *California*, 386 U. S. 18, harmless error. If it was not, petitioner is entitled to a new trial because of a denial of the right to counsel guaranteed by the Sixth Amendment which the Fourteenth Amendment makes obligatory on the States.

Syllabus.

WALKER ET AL. *v.* CITY OF BIRMINGHAM.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 249. Argued March 13–14, 1967.—Decided June 12, 1967.

On April 10, 1963, a temporary injunction was issued by an Alabama circuit court judge, pursuant to a bill of complaint filed by Birmingham officials, enjoining petitioners from participating in or encouraging mass street parades without a permit as required by city ordinance. The bill and accompanying affidavits stated that demonstrations, parades, and picketing had been engaged in by petitioners for the preceding seven days and were expected to continue. Some of the petitioners, who had been served with copies of the writ the next morning, held a press conference and announced their intention to disobey the injunction. No permit to parade was then or thereafter requested, but parades were held on April 12, Good Friday, and April 14, Easter Sunday. At a contempt hearing petitioners sought to attack the constitutionality of the injunction on the ground that it was vague, overbroad, and restrained free speech. They also sought to attack the parade ordinance on a similar ground and on the basis that it had been administered in an arbitrary and discriminatory manner. The circuit judge refused to consider these contentions, stating that there had been no motion to dissolve the injunction or any effort to comply with it by applying for a parade permit. The court held that the only issues were whether it had jurisdiction to issue the injunction and whether petitioners had knowingly violated it. Petitioners were found guilty and the Alabama Supreme Court affirmed. *Held:* Petitioners could not bypass orderly judicial review of the temporary injunction before disobeying it. *Howat* v. *Kansas*, 258 U. S. 181. Pp. 314–320.

(a) The state court that issued the injunction had, as a court of equity, jurisdiction over petitioners and over the subject matter of the controversy. P. 315.

(b) The injunction was consistent with the strong interest of the city government in regulating the use of its streets and other public places. Pp. 315–316.

(c) While the generality of language in the parade ordinance would raise substantial constitutional issues, petitioners did not apply to the courts for an authoritative construction which might

have given the licensing authority granted in the ordinance a narrow and precise scope. As in *Cox* v. *New Hampshire*, 312 U. S. 569, and *Poulos* v. *New Hampshire*, 345 U. S. 395, it cannot be assumed that the ordinance is void on its face. Pp. 316–317.

(d) The breadth and vagueness of the injunction itself would be subject to constitutional question, but the way to raise that question was to apply to the state courts to have the injunction modified or dissolved. P. 317.

(e) Even if the parade ordinance on which the injunction was based had been previously administered in an arbitrary and discriminatory manner, it does not follow that the ordinance is void on its face. Petitioners did not apply for a parade permit after issuance of the injunction, the claimed arbitrary refusal of which would have been considered by the state court upon a motion to dissolve the injunction. Pp. 317–318.

(f) The rule of law which the Alabama courts relied on was firmly established by precedents which put petitioners on notice that they could not bypass orderly judicial review of the injunction before disobeying it. P. 319.

279 Ala. 53, 181 So. 2d 493, affirmed.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *James M. Nabrit III*, *Norman C. Amaker*, *Leroy D. Clark*, *Charles Stephen Ralston*, *Arthur D. Shores*, *Orzell Billingsley, Jr.*, and *Anthony G. Amsterdam*.

Earl McBee and *J. M. Breckenridge* argued the cause for respondent. With them on the brief was *William C. Walker*.

Louis F. Claiborne, by special leave of Court, argued the cause for the United States, as *amicus curiae*, urging reversal. With him on the brief were *Solicitor General Marshall* and *Assistant Attorney General Doar*.

Mr. Justice Stewart delivered the opinion of the Court.

On Wednesday, April 10, 1963, officials of Birmingham, Alabama, filed a bill of complaint in a state circuit court asking for injunctive relief against 139 individuals and

two organizations. The bill and accompanying affidavits stated that during the preceding seven days:

> "[R]espondents [had] sponsored and/or participated in and/or conspired to commit and/or to encourage and/or to participate in certain movements, plans or projects commonly called 'sit-in' demonstrations, 'kneel-in' demonstrations, mass street parades, trespasses on private property after being warned to leave the premises by the owners of said property, congregating in mobs upon the public streets and other public places, unlawfully picketing private places of business in the City of Birmingham, Alabama; violation of numerous ordinances and statutes of the City of Birmingham and State of Alabama . . . ."

It was alleged that this conduct was "calculated to provoke breaches of the peace," "threaten[ed] the safety, peace and tranquility of the City," and placed "an undue burden and strain upon the manpower of the Police Department."

The bill stated that these infractions of the law were expected to continue and would "lead to further imminent danger to the lives, safety, peace, tranquility and general welfare of the people of the City of Birmingham," and that the "remedy by law [was] inadequate." The circuit judge granted a temporary injunction as prayed in the bill, enjoining the petitioners from, among other things, participating in or encouraging mass street parades or mass processions without a permit as required by a Birmingham ordinance.[1]

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[1] The text of the injunction is reproduced as Appendix A to this opinion.

The Birmingham parade ordinance, § 1159 of the Birmingham City Code, provides that:

"It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession

Five of the eight petitioners were served with copies of the writ early the next morning. Several hours later four of them held a press conference. There a statement was distributed, declaring their intention to disobey the injunction because it was "raw tyranny under the guise of maintaining law and order." [2] At this press conference one of the petitioners stated: "That they had respect for the Federal Courts, or Federal Injunctions, but in the past the State Courts had favored local law enforcement, and if the police couldn't handle it, the mob would."

That night a meeting took place at which one of the petitioners announced that "[i]njunction or no injunction we are going to march tomorrow." The next afternoon, Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North in Birmingham. A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,000 to 1,500 onlookers stood by, "clapping, and hollering, and [w]hoop-

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or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

"The two preceding paragraphs, however, shall not apply to funeral processions."

[2] The full statement is reproduced as Appendix B to this opinion.

ing." Some of the crowd followed the marchers and spilled out into the street. At least three of the petitioners participated in this march.

Meetings sponsored by some of the petitioners were held that night and the following night, where calls for volunteers to "walk" and go to jail were made. On Easter Sunday, April 14, a crowd of between 1,500 and 2,000 people congregated in the midafternoon in the vicinity of Seventh Avenue and Eleventh Street North in Birmingham. One of the petitioners was seen organizing members of the crowd in formation. A group of about 50, headed by three other petitioners, started down the sidewalk two abreast. At least one other petitioner was among the marchers. Some 300 or 400 people from among the onlookers followed in a crowd that occupied the entire width of the street and overflowed onto the sidewalks. Violence occurred. Members of the crowd threw rocks that injured a newspaperman and damaged a police motorcycle.

The next day the city officials who had requested the injunction applied to the state circuit court for an order to show cause why the petitioners should not be held in contempt for violating it. At the ensuing hearing the petitioners sought to attack the constitutionality of the injunction on the ground that it was vague and overbroad, and restrained free speech. They also sought to attack the Birmingham parade ordinance upon similar grounds, and upon the further ground that the ordinance had previously been administered in an arbitrary and discriminatory manner.

The circuit judge refused to consider any of these contentions, pointing out that there had been neither a motion to dissolve the injunction, nor an effort to comply with it by applying for a permit from the city commission before engaging in the Good Friday and Easter Sunday parades. Consequently, the court held that the

only issues before it were whether it had jurisdiction to issue the temporary injunction, and whether thereafter the petitioners had knowingly violated it. Upon these issues the court found against the petitioners, and imposed upon each of them a sentence of five days in jail and a $50 fine, in accord with an Alabama statute.[3]

The Supreme Court of Alabama affirmed.[4] That court, too, declined to consider the petitioners' constitutional

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[3] "The circuit court, or judges thereof when exercising equity jurisdiction and powers may punish for contempt by fine not exceeding fifty dollars, and by imprisonment, not exceeding five days, one or both." Ala. Code, Tit. 13, § 143. See also *id.*, §§ 4–5, 126.

The circuit court dismissed the contempt proceedings against several individuals on grounds of insufficient evidence.

Those petitioners who participated in the April 11 press conference contend that the circuit court improperly relied on this incident in finding them guilty of contempt, claiming that they were engaged in constitutionally protected free speech. We find no indication that the court considered the incident for any purpose other than the legitimate one of establishing that the participating petitioners' subsequent violation of the injunction by parading without a permit was willful and deliberate.

[4] The Alabama Supreme Court quashed the conviction of one defendant because of insufficient proof that he knew of the injunction before violating it, and the convictions of two others because there was no showing that they had disobeyed the order. 279 Ala. 53, 64, 181 So. 2d 493, 504.

Two of the petitioners here claim that there was a complete dearth of evidence to establish that they had knowledge of the injunction before violating it, and that their convictions are therefore constitutionally defective under the principle of *Thompson* v. *Louisville*, 362 U. S. 199. The Alabama Supreme Court's recitation of the evidence on this issue, which is supported by the record, plainly shows this claim is without foundation. It is, of course, a familiar doctrine that proof of the elements of criminal contempt may be established by circumstantial evidence. *Bullock* v. *United States*, 265 F. 2d 683, cert. denied *sub nom. Kasper* v. *United States*, 360 U. S. 932.

attacks upon the injunction and the underlying Birmingham parade ordinance:

> "It is to be remembered that petitioners are charged with violating a temporary injunction. We are not reviewing a denial of a motion to dissolve or discharge a temporary injunction. Petitioners did not file any motion to vacate the temporary injunction until after the Friday and Sunday parades. Instead, petitioners deliberately defied the order of the court and did engage in and incite others to engage in mass street parades without a permit.
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> . . . . .
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> "We hold that the circuit court had the duty and authority, in the first instance, to determine the validity of the ordinance, and, until the decision of the circuit court is reversed for error by orderly review, either by the circuit court or a higher court, the orders of the circuit court based on its decision are to be respected and disobedience of them is contempt of its lawful authority, to be punished. Howat v. State of Kansas, 258 U. S. 181." 279 Ala. 53, 60, 62–63, 181 So. 2d 493, 500, 502.

Howat v. *Kansas*, 258 U. S. 181, was decided by this Court almost 50 years ago. That was a case in which people had been punished by a Kansas trial court for refusing to obey an antistrike injunction issued under the state industrial relations act. They had claimed a right to disobey the court's order upon the ground that the state statute and the injunction based upon it were invalid under the Federal Constitution. The Supreme Court of Kansas had affirmed the judgment, holding that the trial court "had general power to issue injunctions in equity and that, even if its exercise of the power was erroneous, the injunction was not void, and the defendants were pre-

cluded from attacking it in this collateral proceeding . . . that, if the injunction was erroneous, jurisdiction was not thereby forfeited, that the error was subject to correction only by the ordinary method of appeal, and disobedience to the order constituted contempt." 258 U. S., at 189.

This Court, in dismissing the writ of error, not only unanimously accepted but fully approved the validity of the rule of state law upon which the judgment of the Kansas court was grounded:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." 258 U. S., at 189–190.

The rule of state law accepted and approved in *Howat* v. *Kansas* is consistent with the rule of law followed by the federal courts.[5]

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[5] *Brougham* v. *Oceanic Steam Navigation Co.*, 205 F. 857; *Trickett* v. *Kaw Valley Drainage Dist.*, 25 F. 2d 851, cert. denied, 278 U. S. 624; *O'Hearne* v. *United States*, 62 App. D. C. 285, 66 F. 2d 933, cert. denied, 290 U. S. 683; *Locke* v. *United States*, 75 F. 2d 157, cert. denied, 295 U. S. 733; *McCann* v. *New York Stock Exchange*, 80 F. 2d 211, cert. denied *sub nom. McCann* v. *Leibell*, 299 U. S. 603; *McLeod* v. *Majors*, 102 F. 2d 128; *Kasper* v. *Brittain*, 245 F. 2d 92,

In the present case, however, we are asked to hold that this rule of law, upon which the Alabama courts relied, was constitutionally impermissible. We are asked to say that the Constitution compelled Alabama to allow the petitioners to violate this injunction, to organize and engage in these mass street parades and demonstrations, without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms. Whatever the limits of *Howat* v. *Kansas*,[6] we cannot accept the petitioners' contentions in the circumstances of this case.

Without question the state court that issued the injunction had, as a court of equity, jurisdiction over the petitioners and over the subject matter of the controversy.[7] And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity. We have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places. *Cox* v. *New Hampshire*, 312 U. S. 569; *Kovacs* v. *Cooper*, 336 U. S. 77; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Adderley*

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cert. denied, 355 U. S. 834. See also *Ex parte Rowland*, 104 U. S. 604; *In re Ayers*, 123 U. S. 443; *In re Burrus*, 136 U. S. 586; *United States* v. *Shipp*, 203 U. S. 563; *United States* v. *Mine Workers*, 330 U. S. 258.

[6] In *In re Green*, 369 U. S. 689, the petitioner was convicted of criminal contempt for violating a labor injunction issued by an Ohio court. Relying on the pre-emptive command of the federal labor law, the Court held that the state courts were required to hear Green's claim that the state court was *without jurisdiction* to issue the injunction. The petitioner in *Green*, unlike the petitioners here, had attempted to challenge the validity of the injunction *before* violating it by promptly applying to the issuing court for an order vacating the injunction. The petitioner in *Green* had further offered to prove that the court issuing the injunction had agreed to its violation as an appropriate means of testing its validity.

[7] Ala. Const., Art. 6, § 144; Ala. Code, Tit. 7, §§ 1038–1039.

v. *Florida*, 385 U. S. 39. When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. As the Court stated, in *Cox* v. *Louisiana*, "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." 379 U. S. 536, 555. And as a unanimous Court stated in *Cox* v. *New Hampshire:*

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." 312 U. S., at 574.

The generality of the language contained in the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions.[8] *Schneider* v. *State*, 308 U. S. 147; *Saia* v. *New York*, 334 U. S. 558; *Kunz* v. *New York*, 340 U. S. 290. The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordi-

[8] See n. 1, *supra*.

nance a narrow and precise scope, as did the New Hampshire courts in *Cox* v. *New Hampshire* and *Poulos* v. *New Hampshire,* both *supra.* Cf. *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 91; *City of Darlington* v. *Stanley,* 239 S. C. 139, 122 S. E. 2d 207. Here, just as in *Cox* and *Poulos,* it could not be assumed that this ordinance was void on its face.

The breadth and vagueness of the injunction itself would also unquestionably be subject to substantial constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved. The injunction in all events clearly prohibited mass parading without a permit, and the evidence shows that the petitioners fully understood that prohibition when they violated it.

The petitioners also claim that they were free to disobey the injunction because the parade ordinance on which it was based had been administered in the past in an arbitrary and discriminatory fashion. In support of this claim they sought to introduce evidence that, a few days before the injunction issued, requests for permits to picket had been made to a member of the city commission. One request had been rudely rebuffed,[9] and this same official had later made clear that he

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[9] Mrs. Lola Hendricks, *not* a petitioner in this case, testified that on April 3:

"I went to Mr. Connor's office, the Commissioner's office at the City Hall Building. We went up and Commissioner Connor met us at the door. He asked, 'May I help you?' I told him, 'Yes, sir, we came up to apply or see about getting a permit for picketing, parading, demonstrating.'

. . . . . .

"I asked Commissioner Connor for the permit, and asked if he could issue the permit, or other persons who would refer me to, persons who would issue a permit. He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,' and he repeated that twice."

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was without power to grant the permit alone, since the issuance of such permits was the responsibility of the entire city commission.[10] Assuming the truth of this proffered evidence, it does not follow that the parade ordinance was void on its face. The petitioners, moreover, did not apply for a permit either to the commission itself or to any commissioner after the injunction issued. Had they done so, and had the permit been refused, it is clear that their claim of arbitrary or discriminatory administration of the ordinance would have been considered by the state circuit court upon a motion to dissolve the injunction.[11]

This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two

[10] Commissioner Connor sent the following telegram to one of the petitioners on April 5:

"Under the provisions of the city code of the City of Birmingham, a permit to picket as requested by you cannot be granted by me individually but is the responsiboity [*sic*] of the entire commission. I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama.

"Eugene 'Bull' Connor, Commissioner of Public Safety."

[11] In its opinion, that court stated: "The legal and orderly processes of the Court would require the defendants to attack the unreasonable denial of such permit by the Commission of the City of Birmingham through means of a motion to dissolve the injunction at which time this Court would have the opportunity to pass upon the question of whether or not a compliance with the ordinance was attempted and whether or not an arbitrary and capricious denial of such request was made by the Commission of the City of Birmingham. Since this course of conduct was not sought by the defendants, the Court is of the opinion that the validity of its injunction order stands upon its prima facie authority to execute the same."

days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period. The injunction had issued *ex parte;* if the court had been presented with the petitioners' contentions, it might well have dissolved or at least modified its order in some respects. If it had not done so, Alabama procedure would have provided for an expedited process of appellate review.[12] It cannot be presumed that the Alabama courts would have ignored the petitioners' constitutional claims. Indeed, these contentions were accepted in another case by an Alabama appellate court that struck down on direct review the conviction under this very ordinance of one of these same petitioners.[13]

The rule of law upon which the Alabama courts relied in this case was one firmly established by previous precedents. We do not deal here, therefore, with a situation where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar. *Barr* v. *City of Columbia,* 378 U. S. 146. This is not a case where a procedural requirement has been sprung upon an unwary litigant when prior practice did not give him fair notice of its existence. *Wright* v. *Georgia,* 373 U. S. 284, 291.

The Alabama Supreme Court has apparently never in any criminal contempt case entertained a claim of nonjurisdictional error.[14] In *Fields* v. *City of Fairfield,* 273

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[12] Ala. Code, Tit. 7 App., Sup. Ct. Rule 47.

[13] *Shuttlesworth* v. *City of Birmingham,* 43 Ala. App. 68, 180 So. 2d 114. The case is presently pending on certiorari review in the Alabama Supreme Court.

[14] As early as 1904, the Alabama Supreme Court noted that: "An evident distinction is to be made in contempt proceedings for the

Ala. 588, 143 So. 2d 177,[15] decided just three years before the present case, the defendants, members of a "White Supremacy" organization who had disobeyed an injunction, sought to challenge the constitutional validity of a permit ordinance upon which the injunction was based. The Supreme Court of Alabama, finding that the trial court had jurisdiction, applied the same rule of law which was followed here:

> "As a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially declared in appropriate proceedings, no person charged with its observance under an order or decree may disregard or violate the order or the decree with immunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree . . . ." 273 Ala., at 590, 143 So. 2d, at 180.

These precedents clearly put the petitioners on notice that they could not bypass orderly judicial review of the injunction before disobeying it. Any claim that they were entrapped or misled is wholly unfounded, a conclusion confirmed by evidence in the record showing that when the petitioners deliberately violated the injunction they expected to go to jail.

The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted

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violation of the writ of injunction, where the writ is improvidently or irregularly issued, and where it is issued without jurisdiction . . . ." *Old Dominion Telegraph Co.* v. *Powers,* 140 Ala. 220, 226, 37 So. 195, 197. See *Board of Revenue of Covington County* v. *Merrill,* 193 Ala. 521, 68 So. 971.

[15] Reversed on other grounds, 375 U. S. 248.

his station, however righteous his motives, and irrespective of his race, color, politics, or religion.[16] This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Affirmed.

APPENDIX A TO OPINION OF THE COURT.

"TEMPORARY INJUNCTION—April 10, 1963.

"A verified Bill of Complaint in the above styled cause having been presented to me on this the 10th of April 1963 at 9:00 O'Clock P. M. in the City of Birmingham, Alabama.

"Upon consideration of said verified Bill of Complaint and the affidavits of Captain G. V. Evans and Captain George Wall, and the public welfare, peace and safety requiring it, it is hereby considered, ordered, adjudged and decreed that a peremptory or a temporary writ of injunction be and the same is hereby issued in accordance with the prayer of said petition.

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[16] The same rule of law was followed in *Kasper* v. *Brittain*, 245 F. 2d 92. There, a federal court had ordered the public high school in Clinton, Tennessee, to desegregate. Kasper "arrived from somewhere in the East," and organized a campaign "to run the Negroes out of the school." The federal court issued an *ex parte* restraining order enjoining Kasper from interfering with desegregation. Relying upon the First Amendment, Kasper harangued a crowd "to the effect that although he had been served with the restraining order, it did not mean anything . . . ." His conviction for criminal contempt was affirmed by the Court of Appeals for the Sixth Circuit. That court concluded that "an injunctional order issued by a court must be obeyed," whatever its seeming invalidity, citing *Howat* v. *Kansas*, 258 U. S. 181. This Court denied certiorari, 355 U. S. 834.

"It is therefore ordered, adjudged and decreed by the Court that upon the complainant entering into a good and sufficient bond conditioned as provided by law, in the sum of Twenty five Hundred Dollars ($2500.00), same to be approved by the Register of this Court that the Register issue a peremptory or temporary writ of injunction that the respondents and the others identified in said Bill of Complaint, their agents, members, employees, servants, followers, attorneys, successors and all other persons in active concert or participation with the respondents and all persons having notice of said order from continuing any act hereinabove designated particularly: engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or like demonstrations without a permit, trespass on private property after being warned to leave the premises by the owner or person in possession of said private property, congregating on the street or public places into mobs, and unlawfully picketing business establishments or public buildings in the City of Birmingham, Jefferson County, State of Alabama or performing acts calculated to cause breaches of the peace in the City of Birmingham, Jefferson County, in the State of Alabama or from conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations, unlawful boycotts, unlawful trespasses, and unlawful picketing or other like unlawful conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama or from doing any acts designed to consummate conspiracies to engage in said unlawful acts of parading, demonstrating, boycotting, trespassing and picketing or other unlawful acts, or from engaging in acts and conduct customarily known as 'kneel-ins' in churches in violation of the wishes and desires of said churches.

"W. A. Jenkins, Jr., As Circuit Judge of the Tenth Judicial Circuit of Alabama, In Equity Sitting."

APPENDIX B TO OPINION OF THE COURT.

"In our struggle for freedom we have anchored our faith and hope in the rightness of the Constitution and the moral laws of the universe.

"Again and again the Federal judiciary has made it clear that the priviledges [*sic*] guaranteed under the First and the Fourteenth Amendments are to [*sic*] sacred to be trampled upon by the machinery of state government and police power. In the past we have abided by Federal injunctions out of respect for the forthright and consistent leadership that the Federal judiciary has given in establishing the principle of integration as the law of the land.

"However we are now confronted with recalcitrant forces in the Deep South that will use the courts to perpetuate the unjust and illegal system of racial separation.

"Alabama has made clear its determination to defy the law of the land. Most of its public officials, its legislative body and many of its law enforcement agents have openly defied the desegregation decision of the Supreme Court. We would feel morally and legal [*sic*] responsible to obey the injunction if the courts of Alabama applied equal justice to all of its citizens. This would be sameness made legal. However the ussuance [*sic*] of this injunction is a blatant of *difference* made *legal.*

"Southern law enforcement agencies have demonstrated now and again that they will utilize the force of law to misuse the judicial process.

"This is raw tyranny under the guise of maintaining law and order. We cannot in all good conscience obey such an injunction which is an unjust, undemocratic and unconstitutional misuse of the legal process.

"We do this not out of any desrespect [*sic*] for the law but out of the highest respect for *the* law. This is not an attempt to evade or defy the law or engage in

chaotic anarchy. Just as in all good conscience we cannot obey unjust laws, neither can we respect the unjust use of the courts.

"We believe in a system of law based on justice and morality. Out of our great love for the Constitution of the U. S. and our desire to purify the judicial system of the state of Alabama, we risk this critical move with an awareness of the possible consequences involved."

MR. CHIEF JUSTICE WARREN, whom MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS join, dissenting.

Petitioners in this case contend that they were convicted under an ordinance that is unconstitutional on its face because it submits their First and Fourteenth Amendment rights to free speech and peaceful assembly to the unfettered discretion of local officials. They further contend that the ordinance was unconstitutionally applied to them because the local officials used their discretion to prohibit peaceful demonstrations by a group whose political viewpoint the officials opposed. The Court does not dispute these contentions, but holds that petitioners may nonetheless be convicted and sent to jail because the patently unconstitutional ordinance was copied into an injunction—issued *ex parte* without prior notice or hearing on the request of the Commissioner of Public Safety—forbidding all persons having notice of the injunction to violate the ordinance without any limitation of time. I dissent because I do not believe that the fundamental protections of the Constitution were meant to be so easily evaded, or that "the civilizing hand of law" would be hampered in the slightest by enforcing the First Amendment in this case.

The salient facts can be stated very briefly. Petitioners are Negro ministers who sought to express their concern about racial discrimination in Birmingham, Alabama, by holding peaceful protest demonstrations in that

city on Good Friday and Easter Sunday 1963. For obvious reasons, it was important for the significance of the demonstrations that they be held on those particular dates. A representative of petitioners' organization went to the City Hall and asked "to see the person or persons in charge to issue permits, permits for parading, picketing, and demonstrating." She was directed to Public Safety Commissioner Connor, who denied her request for a permit in terms that left no doubt that petitioners were not going to be issued a permit under any circumstances. "He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,' and he repeated that twice." A second, telegraphic request was also summarily denied, in a telegram signed by "Eugene 'Bull' Connor," with the added information that permits could be issued only by the full City Commission, a three-man body consisting of Commissioner Connor and two others.[1] According to petitioners' offer

[1] The uncontradicted testimony relating to the rebuffs of petitioners' attempts to obtain a permit is set out in footnotes 9 and 10 of the majority opinion. Petitioners were prevented by a ruling of the trial court from introducing further proof of the intransigence of Commissioner Connor and the other city officials toward any effort by Negroes to protest segregation and racial injustice. The attitude of the city administration in general and of its Public Safety Commissioner in particular are a matter of public record, of course, and are familiar to this Court from previous litigation. See *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87 (1965); *Shuttlesworth* v. *City of Birmingham,* 376 U. S. 339 (1964); *Shuttlesworth* v. *City of Birmingham,* 373 U. S. 262 (1963); *Gober* v. *City of Birmingham,* 373 U. S. 374 (1963); *In re Shuttlesworth,* 369 U. S. 35 (1962). The United States Commission on Civil Rights found continuing abuse of civil rights protesters by the Birmingham police, including use of dogs, clubs, and firehoses. 1963 Report of the United States Commission on Civil Rights 114 (Government Printing Office, 1963). Commissioner Eugene "Bull" Connor, a self-proclaimed white supremacist (see Congress and the Nation 1945–1964: A Review of Government and Politics in the Postwar Years 1604 (Con-

of proof, the truth of which is assumed for purposes of this case, parade permits had uniformly been issued for all other groups by the city clerk on the request of the traffic bureau of the police department, which was under Commissioner Connor's direction. The requirement that the approval of the full Commission be obtained was applied only to this one group.

Understandably convinced that the City of Birmingham was not going to authorize their demonstrations under any circumstances, petitioners proceeded with their plans despite Commissioner Connor's orders. On Wednesday, April 10, at 9 in the evening, the city filed in a state circuit court a bill of complaint seeking an *ex parte* injunction. The complaint recited that petitioners were engaging in a series of demonstrations as "part of a massive effort . . . to forcibly integrate all business establishments, churches, and other institutions" in the city, with the result that the police department was strained in its resources and the safety, peace, and tranquility were threatened. It was alleged as particularly menacing that petitioners were planning to conduct "kneel-in" demonstrations at churches where their presence was not wanted. The city's police dogs were said to be in danger of their lives. Faced with these recitals, the Circuit Court issued the injunction in the form requested, and in effect ordered petitioners and all other persons having notice of the order to refrain for an unlimited time from carrying on any demonstrations without a permit. A permit, of course, was clearly unobtain-

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gressional Quarterly Service, 1965)), made no secret of his personal attitude toward the rights of Negroes and the decisions of this Court. He vowed that racial integration would never come to Birmingham, and wore a button inscribed "Never" to advertise that vow. Yet the Court indulges in speculation that these civil rights protesters might have obtained a permit from this city and this man had they made enough repeated applications.

able; the city would not have sought this injunction if it had any intention of issuing one.

Petitioners were served with copies of the injunction at various times on Thursday and on Good Friday. Unable to believe that such a blatant and broadly drawn prior restraint on their First Amendment rights could be valid, they announced their intention to defy it and went ahead with the planned peaceful demonstrations on Easter weekend. On the following Monday, when they promptly filed a motion to dissolve the injunction, the court found them in contempt, holding that they had waived all their First Amendment rights by disobeying the court order.

These facts lend no support to the court's charges that petitioners were presuming to act as judges in their own case, or that they had a disregard for the judicial process. They did not flee the jurisdiction or refuse to appear in the Alabama courts. Having violated the injunction, they promptly submitted themselves to the courts to test the constitutionality of the injunction and the ordinance it parroted. They were in essentially the same position as persons who challenge the constitutionality of a statute by violating it, and then defend the ensuing criminal prosecution on constitutional grounds. It has never been thought that violation of a statute indicated such a disrespect for the legislature that the violator always must be punished even if the statute was unconstitutional. On the contrary, some cases have required that persons seeking to challenge the constitutionality of a statute first violate it to establish their standing to sue.[2] Indeed, it shows no disrespect for law to violate a statute on the ground that it is unconstitutional and then to submit one's case to the courts with the willingness to accept the penalty if the statute is held to be valid.

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[2] See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 86–94 (1947).

The Court concedes that "[t]he generality of the language contained in the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions." [3] *Ante*, p. 316. That concession is well-founded but minimal. I believe it is patently unconstitutional on its face. Our decisions have consistently held that picketing and parading are means of expression protected by the First Amendment, and that the right to picket or parade may not be subjected to the unfettered discretion of local officials. *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). Although a city may regulate the manner of use of its streets and sidewalks in the interest of keeping them open for the movement of traffic, it may not allow local officials unbridled discretion to decide who shall be allowed to parade or picket and who shall not. "Wherever the title of streets and parks may rest, they have immemorially been held

[3] The opinion does speculate that the Alabama courts might have saved the ordinance by giving the licensing authority granted in the ordinance "a narrow and precise scope," as did the New Hampshire courts in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), and *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953). This suggestion ignores the fact that the statute in *Cox* and the ordinance in *Poulos* merely provided that licenses for parades and certain other gatherings must be obtained. They did not authorize local officials to determine whether the proposed parade was consistent with "the public welfare, peace, safety, health, decency, good order, morals or convenience," as does the Birmingham ordinance involved in this case, and so it was perfectly consistent with the statutory language for the New Hampshire Supreme Court to hold that under the statute and ordinance parade applicants had a right to a license "with regard only to considerations of time, place and manner so as to conserve the public convenience." 312 U. S., at 575–576. By contrast, the Alabama courts could only give a narrow and precise scope to the Birmingham ordinance by repealing some of its language.

in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." *Hague* v. *C. I. O.*, 307 U. S. 496, 515–516 (1939) (opinion of Mr. Justice Roberts). When local officials are given totally unfettered discretion to decide whether a proposed demonstration is consistent with "public welfare, peace, safety, health, decency, good order, morals or convenience," as they were in this case, they are invited to act as censors over the views that may be presented to the public.[4] The unconstitutionality of the ordinance is compounded, of course, when there is convincing evidence that the officials have in fact used their power to deny permits to organizations whose views they dislike.[5] The record in this case hardly suggests that Commissioner Connor and the other city officials were motivated in prohibiting civil rights picketing only by their overwhelming concern for particular traffic problems. Petitioners were given to

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[4] *Staub* v. *City of Baxley*, 355 U. S. 313 (1958); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

"I believe that the First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all." *Cox* v. *Louisiana*, 379 U. S. 536, 580 (1965) (opinion of MR. JUSTICE BLACK).

[5] *Niemotko* v. *Maryland*, *supra*.

understand that under no circumstances would they be permitted to demonstrate in Birmingham, not that a demonstration would be approved if a time and place were selected that would minimize the traffic difficulties. The only circumstance that the court can find to justify anything other than a *per curiam* reversal is that Commissioner Connor had the foresight to have the unconstitutional ordinance included in an *ex parte* injunction, issued without notice or hearing or any showing that it was impossible to have notice or a hearing, forbidding the world at large (insofar as it knew of the order) to conduct demonstrations in Birmingham without the consent of the city officials. This injunction was such potent magic that it transformed the command of an unconstitutional statute into an impregnable barrier, challengeable only in what likely would have been protracted legal proceedings and entirely superior in the meantime even to the United States Constitution.

I do not believe that giving this Court's seal of approval to such a gross misuse of the judicial process is likely to lead to greater respect for the law any more than it is likely to lead to greater protection for First Amendment freedoms. The *ex parte* temporary injunction has a long and odious history in this country, and its susceptibility to misuse is all too apparent from the facts of the case. As a weapon against strikes, it proved so effective in the hands of judges friendly to employers that Congress was forced to take the drastic step of removing from federal district courts the jurisdiction to issue injunctions in labor disputes.[6] The labor injunction fell into disrepute largely because it was abused in precisely the same way that the injunctive power was abused in this case. Judges who were not sympathetic to the union cause commonly issued, without notice or

[6] The Norris-LaGuardia Act, 1932, 47 Stat. 70, 29 U. S. C. §§ 101–115.

hearing, broad restraining orders addressed to large numbers of persons and forbidding them to engage in acts that were either legally permissible or, if illegal, that could better have been left to the regular course of criminal prosecution. The injunctions might later be dissolved, but in the meantime strikes would be crippled because the occasion on which concerted activity might have been effective had passed.[7] Such injunctions, so long discredited as weapons against concerted labor activities, have now been given new life by this Court as weapons against the exercise of First Amendment freedoms. Respect for the courts and for judicial process was not increased by the history of the labor injunction.[8]

Nothing in our prior decisions, or in the doctrine that a party subject to a temporary injunction issued by a court of competent jurisdiction with power to decide a dispute properly before it must normally challenge the injunction in the courts rather than by violating it, requires that we affirm the convictions in this case. The majority opinion in this case rests essentially on a single precedent, and that a case the authority of

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[7] Frankfurter & Greene, The Labor Injunction 47–81 (1930); Cox & Bok, Cases and Materials on Labor Law 101–107 (1962).

[8] "The history of the labor injunction in action puts some matters beyond question. In large part, dissatisfaction and resentment are caused, first, by the refusal of courts to recognize that breaches of the peace may be redressed through criminal prosecution and civil action for damages, and, second, by the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse*, executive and police functions and affecting the livelihood, and even lives, of multitudes. Especially those zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction,' characterized by the consequences of a criminal prosecution without its safeguards, has been challenged." Frankfurter & Greene, *supra*, at 200.

which has clearly been undermined by subsequent decisions. *Howat* v. *Kansas*, 258 U. S. 181 (1922), was decided in the days when the labor injunction was in fashion. Kansas had adopted an Industrial Relations Act, the purpose of which in effect was to provide for compulsory arbitration of labor disputes by a neutral administrative tribunal, the "Court of Industrial Relations." Pursuant to its jurisdiction to investigate and perhaps improve labor conditions in the coal mining industry, the "Court" subpoenaed union leaders to appear and testify. In addition, the State obtained an injunction to prevent a strike while the matter was before the "Court." The union leaders disobeyed both the subpoena and the injunction, and sought to challenge the constitutionality of the Industrial Relations Act in the ensuing contempt proceeding. The Kansas Supreme Court held that the constitutionality of the Act could not be challenged in a contempt proceeding, and this Court upheld that determination.

Insofar as *Howat* v. *Kansas* might be interpreted to approve an absolute rule that any violation of a void court order is punishable as contempt, it has been greatly modified by later decisions. In *In re Green*, 369 U. S. 689 (1962), we reversed a conviction for contempt of a state injunction forbidding labor picketing because the petitioner was not allowed to present evidence that the labor dispute was arguably subject to the jurisdiction of the National Labor Relations Board and hence not subject to state regulation. If an injunction can be challenged on the ground that it deals with a matter arguably subject to the jurisdiction of the National Labor Relations Board, then *a fortiori* it can be challenged on First Amendment grounds.[9]

[9] The attempt in footnote 6 of the majority opinion to distinguish *In re Green* is nothing but an attempt to alter the holding of that case. The opinion of the Court states flatly that "a state court is

It is not necessary to question the continuing validity of the holding in *Howat* v. *Kansas,* however, to demonstrate that neither it nor the *Mine Workers*[10] case supports the holding of the majority in this case. In *Howat* the subpoena and injunction were issued to enable the Kansas Court of Industrial Relations to determine an underlying labor dispute. In the *Mine Workers* case, the District Court issued a temporary antistrike injunction to preserve existing conditions during the time it took to decide whether it had authority to grant the Government relief in a complex and difficult action of enormous importance to the national economy. In both cases the orders were of questionable legality, but in both cases they were reasonably necessary to enable the court or administrative tribunal to decide an underlying controversy of considerable importance before it at the time. This case involves an entirely different situation. The Alabama Circuit Court did not issue this temporary injunction to preserve existing conditions while it proceeded to decide some underlying dispute. There was no underlying dispute before it, and the court in practical effect merely added a judicial signature to a preexisting criminal ordinance. Just as the court had no need to issue the injunction to preserve its ability to

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without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal preemption." 369 U. S., at 692 (footnote omitted). The alleged circumstance that the court issuing the injunction had agreed to its violation as an appropriate means of testing its validity was considered only in a concurring opinion. Although the petitioner in *Green* had attempted to challenge the order in court before violating it, we did not rely on that fact in holding that the order was void. Nor is it clear to me why the Court regards this fact as important, unless it means to imply that the petitioners in this case would have been free to violate the court order if they had first made a motion to dissolve in the trial court.

[10] *United States* v. *United Mine Workers,* 330 U. S. 258 (1947).

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decide some underlying dispute, the city had no need of an injunction to impose a criminal penalty for demonstrating on the streets without a permit. The ordinance already accomplished that. In point of fact, there is only one apparent reason why the city sought this injunction and why the court issued it: to make it possible to punish petitioners for contempt rather than for violating the ordinance, and thus to immunize the unconstitutional statute and its unconstitutional application from any attack. I regret that this strategy has been so successful.

It is not necessary in this case to decide precisely what limits should be set to the *Mine Workers* doctrine in cases involving violations of the First Amendment. Whatever the scope of that doctrine, it plainly was not intended to give a State the power to nullify the United States Constitution by the simple process of incorporating its unconstitutional criminal statutes into judicial decrees. I respectfully dissent.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE FORTAS concur, dissenting.

We sit as a court of law functioning primarily as a referee in the federal system. Our function in cases coming to us from state courts is to make sure that state tribunals and agencies work within the limits of the Constitution. Since the Alabama courts have flouted the First Amendment, I would reverse the judgment.

Picketing and parading are methods of expression protected by the First Amendment against both state and federal abridgment. *Edwards* v. *South Carolina*, 372 U. S. 229, 235–236; *Cox* v. *Louisiana*, 379 U. S. 536, 546–548. Since they involve more than speech itself and implicate street traffic, the accommodation of the public and the like, they may be regulated as to the times

and places of the demonstrations. *Schneider* v. *State*, 308 U. S. 147, 160–161; *Cox* v. *New Hampshire*, 312 U. S. 569; *Poulos* v. *New Hampshire*, 345 U. S. 395, 405–406. But a State cannot deny the right to use streets or parks or other public grounds for the purpose of petitioning for the redress of grievances. See *Hague* v. *C. I. O.*, 307 U. S. 496, 515–516; *Schneider* v. *State*, 308 U. S. 147, 163; *Cox* v. *New Hampshire*, 312 U. S. 569, 574; *Valentine* v. *Chrestensen*, 316 U. S. 52, 54; *Jamison* v. *Texas*, 318 U. S. 413, 415–416.

The rich can buy advertisements in newspapers, purchase radio or television time, and rent billboard space. Those less affluent are restricted to the use of handbills (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 108) or petitions, or parades, or mass meetings. This "right of the people peaceably to assemble, and to petition the Government for a redress of grievances," guaranteed by the First Amendment, applicable to the States by reason of the Fourteenth (*Edwards* v. *South Carolina*, *supra*, at 235), was flouted here.

The evidence shows that a permit was applied for. Mrs. Lola Hendricks, a member of the Alabama Christian Movement for Human Rights, authorized by its president, Reverend Shuttlesworth, on April 3, went to the police department and asked to see the person in charge of issuing permits. She then went to the office of Commissioner Eugene "Bull" Connor and told him that "we came up to apply or see about getting a permit for picketing, parading, demonstrating." She asked Connor for the permit, "asked if he could issue the permit, or other persons who would refer me to, persons who would issue a permit." Commissioner Connor replied, "No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail." On April 5, petitioner Shuttlesworth sent a telegram to Commissioner Connor requesting a permit to picket on designated side-

walks on April 5 and 6. The message stated that "the normal rules of picketing" would be observed. The same day, Connor wired back a reply stating that he could not individually grant a permit, that it was the responsibility of the entire Commission and that he "insist[ed] that you and your people do not start any picketing on the streets in Birmingham, Alabama." Petitioners' efforts to show that the City Commission did not grant permits, but that they were granted by the city clerk at the request of the traffic division were cut off.

The record shows that petitioners did not deliberately attempt to circumvent the permit requirement. Rather they diligently attempted to obtain a permit and were rudely rebuffed and then reasonably concluded that any further attempts would be fruitless.

The right to defy an unconstitutional statute is basic in our scheme. Even when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble, it need not be honored when it is invalid on its face. *Lovell* v. *Griffin,* 303 U. S. 444, 452–453; *Thornhill* v. *Alabama,* 310 U. S. 88, 97; *Jones* v. *Opelika,* 316 U. S. 584, 602, adopted *per curiam* on rehearing, 319 U. S. 103, 104; *Cantwell* v. *Connecticut,* 310 U. S. 296, 305–306; *Thomas* v. *Collins,* 323 U. S. 516; *Staub* v. *City of Baxley,* 355 U. S. 313, 319.

By like reason, where a permit has been arbitrarily denied, one need not pursue the long and expensive route to this Court to obtain a remedy. The reason is the same in both cases. For if a person must pursue his judicial remedy before he may speak, parade, or assemble, the occasion when protest is desired or needed will have become history and any later speech, parade, or assembly will be futile or pointless.

Howat v. *Kansas,* 258 U. S. 181, states the general rule that court injunctions are to be obeyed until error is found by normal and orderly review procedures. See

United States v. *Mine Workers,* 330 U. S. 258, 293–294. But there is an exception where "the question of jurisdiction" is "frivolous and not substantial." *Id.,* at 293. Moreover, a state court injunction is not *per se* sacred where federal constitutional questions are involved. *In re Green,* 369 U. S. 689, held that contempt could not be imposed without a hearing where the state decree bordered the federal domain in labor relations and only a hearing could determine whether there was federal pre-emption. In the present case the collision between this state court decree and the First Amendment is so obvious that no hearing is needed to determine the issue.

As already related, petitioners made two applications to Commissioner "Bull" Connor for a permit and were turned down. At the trial, counsel for petitioners offered to prove through the city clerk that the Commission never has granted a permit, the issuing authority being the city clerk who acts at the request of the traffic division. But he was not allowed to answer the question. And when asked to describe the practice for granting permits an objection was raised and sustained.

It is clear that there are no published rules or regulations governing the manner of applying for permits, and it is clear from the record that some permits are issued. One who reads this record will have, I think, the abiding conviction that these people were denied a permit solely because their skin was not of the right color and their cause was not popular.

A court does not have *jurisdiction* to do what a city or other agency of a State lacks *jurisdiction* to do. The command of the Fourteenth Amendment, through which the First Amendment is made applicable to the States, is that no "State" shall deprive any person of "liberty" without due process of law. The decree of a state court is "state" action in the constitutional sense (*Shelley* v.

Kraemer, 334 U. S. 1, 14–18), as much as the action of the state police, the state prosecutor, the state legislature, or the Governor himself. An ordinance—unconstitutional on its face or patently unconstitutional as applied—is not made sacred by an unconstitutional injunction that enforces it. It can and should be flouted in the manner of the ordinance itself. Courts as well as citizens are not free "to ignore all the procedures of the law," to use the Court's language. The "constitutional freedom" of which the Court speaks can be won only if judges honor the Constitution.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS join, dissenting.

Under cover of exhortation that the Negro exercise "respect for judicial process," the Court empties the Supremacy Clause of its primacy by elevating a state rule of judicial administration above the right of free expression guaranteed by the Federal Constitution. And the Court does so by letting loose a devastatingly destructive weapon for suppression of cherished freedoms heretofore believed indispensable to maintenance of our free society. I cannot believe that this distortion in the hierarchy of values upon which our society has been and must be ordered can have any significance beyond its function as a vehicle to affirm these contempt convictions.

I.

Petitioners are eight Negro ministers. They were convicted of criminal contempt for violation of an *ex parte* injunction issued by the Circuit Court of Jefferson County, Alabama, by engaging in street parades without a municipal permit on Good Friday and Easter Sunday 1963. These were the days when

Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peacefully sought. The purpose of these demonstrations was peaceably to publicize and dramatize the civil rights grievances of the Negro people. The underlying permit ordinance made it unlawful "to organize or hold . . . or to take part or participate in, any parade or procession or other public demonstration on the streets . . ." without a permit. A permit was issuable by the City Commission "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."

Attempts by petitioners at the contempt hearing to show that they tried to obtain a permit but were rudely rebuffed by city officials were aborted when the trial court sustained objections to the testimony. It did appear, however, that on April 3, a member of the Alabama Christian Movement for Human Rights (ACMHR) was sent by one of the petitioners, the Reverend Mr. Shuttlesworth, to Birmingham city hall to inquire about permits for future demonstrations. The member stated at trial:

> "I asked [Police] Commissioner Connor for the permit, and asked if he could issue the permit, or other persons who would refer me to, persons who would issue a permit. He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,' and he repeated that twice."

Two days later the Reverend Mr. Shuttlesworth sent a telegram to Police Commissioner Connor requesting a permit on behalf of ACMHR to picket on given dates "against the injustices of segregation and discrimination." Connor replied that the permit could be granted only by the full Commission and stated, "I insist that you and your people do not start any picketing on the streets in

Birmingham, Alabama." Petitioners were also frustrated in their attempts at the contempt hearing to show that permits were granted, not by the Commission, but by the city clerk at the request of the traffic department, and that they were issued in a discriminatory manner.

On April 6–7 and April 9–10, Negroes were arrested for parading without a permit. Late in the night of April 10, the city requested and immediately obtained an *ex parte* injunction without prior notice to petitioners. Notice of the issuance was given to five of the petitioners on April 11.[1] The decree tracked the wording of the permit ordinance, except that it was still broader and more pervasive. It enjoined:

> ". . . engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or like demonstrations without a permit, trespass on private property after being warned to leave the premises by the owner or person in possession of said private property, congregating on the street or public places into mobs, and unlawfully picketing business establishments or public buildings in the City of Birmingham, Jefferson County, State of Alabama or performing acts calculated to cause breaches of the peace in the City of Birmingham, Jefferson County, in the State of Alabama or from conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations, unlawful boycotts, unlawful trespasses, and unlawful picketing or other like unlawful conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama or from doing any acts designed to consummate conspiracies to engage in said un-

[1] Two petitioners received no personal notice of the injunction at all. The trial court found that they were aware of the injunction, a conclusion here challenged. Because of the disposition I would make of this case, I would not reach this issue.

> lawful acts of parading, demonstrating, boycotting, trespassing and picketing or other unlawful acts, or from engaging in acts and conduct customarily known as 'kneel-ins' in churches in violation of the wishes and desires of said churches. . . ."

Several of the Negro ministers issued statements that they would refuse to comply with what they believed to be, and is indeed, a blatantly unconstitutional restraining order.

On April 12, Good Friday, a planned march took place, beginning at a church in the Negro section of the city and continuing to city hall. The police, who were notified in advance by one of the petitioners of the time and route of the march, blocked the streets to traffic in the area of the church and excluded white persons from the Negro area. Approximately 50 persons marched, led by three petitioners, Martin Luther King, Ralph Abernathy, and Shuttlesworth. A large crowd of Negro onlookers which had gathered outside the church remained separate from the procession. A few blocks from the church the police stopped the procession and arrested, and jailed, most of the marchers, including the three leaders.

On Easter Sunday another planned demonstration was conducted. The police again were given advance notice, and again blocked the streets to traffic and white persons in the vicinity of the church. Several hundred persons were assembled at the church. Approximately 50 persons who emerged from the church began walking peaceably. Several blocks from the church the procession was stopped, as on Good Friday, and about 20 persons, including five petitioners, were arrested. The participants in both parades were in every way orderly; the only episode of violence, according to a police inspector, was rock throwing by three onlookers on Easter Sunday, after petitioners were arrested; the three rock throwers were immediately taken into custody by the police.

On Monday, April 15, petitioners moved to dissolve the injunction, and the city initiated criminal contempt proceedings against petitioners. At the hearing, held a week later, the Jefferson County Court considered the contempt charge first. Petitioners urged that the injunction and underlying permit ordinance were impermissibly vague prior restraints on exercise of First Amendment rights and that the ordinance had been discriminatorily applied. The court, however, limited evidence primarily to two questions: notice of and violation of the injunction. The court stated that "the validity of its injunction order stands upon its prima facie authority to execute the same." Petitioners were found guilty of criminal contempt and sentenced to five days in jail and a $50 fine. The Alabama Supreme Court, adopting the reasoning of *United States* v. *Mine Workers*, 330 U. S. 258, applicable to federal court orders, affirmed, holding that the validity of the injunction and underlying permit ordinance could not be challenged in a contempt proceeding. 279 Ala. 53, 181 So. 2d 493.

II.

The holding of the Alabama Supreme Court, and the affirmance of its decision by this Court, rest on the assumption that petitioners may be criminally punished although the parade ordinance and the injunction be unconstitutional on their faces as in violation of the First Amendment, and even if the parade ordinance was discriminatorily applied. It must therefore be assumed, for purposes of review of the Alabama Supreme Court's decision, and in assessing the Court's affirmance, that petitioners could successfully sustain the contentions (into which the Alabama courts refused to inquire) that the ordinance and injunction are in fact facially unconstitutional as excessively vague prior restraints on First Amendment rights and that the ordinance had been dis-

criminatorily applied. It should be noted, without elaboration, that there is clearly sound basis in fact for this assumption: the Alabama Court of Appeals, in a case involving one of these petitioners, has held that the ordinance is "void for vagueness because of overbroad, and consequently meaningless, standards for the issuance of permits for processions," and that the ordinance has been enforced discriminatorily. *Shuttlesworth* v. *City of Birmingham*, 43 Ala. App. 68, 180 So. 2d 114 (1965). However, it is not the merits of such claims, but the refusal of the Alabama courts to consider them, that is here involved.[2]

Like the Court, I start with the premise that States are free to adopt rules of judicial administration designed to require respect for their courts' orders. See *Howat* v. *Kansas*, 258 U. S. 181.[3] But this does not mean that this

[2] Thus not an issue here is the extent of the State's right to control the manner of use of its streets and sidewalks. Since the Alabama courts refused to consider the merits of petitioners' constitutional claims it must be assumed for purposes of review that the ordinance and injunction were invalid attempts to exercise such control.

In *Kasper* v. *Brittain*, 245 F. 2d 92, both the District Court and the Court of Appeals afforded the appellant full consideration of his First Amendment contention and found it to be without merit. In that circumstance, the language of the opinion of the Court of Appeals, 245 F. 2d, at 96, presented no issue for this Court's review.

[3] It should be noted that the State's interest in the integrity of its injunctive remedy in the present case is of a different order than that embodied in our *Mine Workers* rule. The injunctive remedy was not here necessary to preserve the *status quo* while a case was pending decision, but was merely the conversion of a broad statutory restraint into a broader injunctive restraint of indefinite duration, unrelated to any pending litigation. This Court's decision in *Mine Workers* was directed to the integrity of the District Court's power "to preserve existing conditions while it was determining its own authority to grant injunctive relief." *United States* v. *Mine Workers*, 330 U. S. 258, 293. In *Howat* v. *Kansas*, 258 U. S. 181, the state court's order related to a pending proceeding before the state "Court of Industrial Relations." The State's interest is here

valid state interest does not admit of collision with other and more vital interests. Surely the proposition requires no citation that a valid state interest must give way when it infringes on rights guaranteed by the Federal Constitution. The plain meaning of the Supremacy Clause requires no less.

In the present case we are confronted with a collision between Alabama's interest in requiring adherence to orders of its courts and the constitutional prohibition against abridgment of freedom of speech, more particularly "the right of the people peaceably to assemble," and the right "to petition the Government for a redress of grievances." See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359; *De Jonge* v. *Oregon*, 299 U. S. 353; *Thornhill* v. *Alabama*, 310 U. S. 88; *Edwards* v. *South Carolina*, 372 U. S. 229; *Cox* v. *Louisiana*, 379 U. S. 536. Special considerations have time and again been deemed by us to attend protection of these freedoms in the face of state interests the vindication of which results in prior restraints upon their exercise,[4] or their regulation in a vague or overbroad manner,[5] or in a way which gives unbridled discretion to limit their exercise to an individual or group of individuals.[6] To give these freedoms the necessary "breathing space to survive," *NAACP* v. *Button*, 371 U. S. 415, 433, the Court has modified traditional rules of standing and prematurity. See *Dombrowski* v.

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further limited by the traditional rule of equity jurisdiction that equity does not normally restrain criminal acts but that the State should proceed by criminal prosecution with its attending safeguards.

[4] See, *e. g.*, *Near* v. *Minnesota*, 283 U. S. 697, 713–720; *Freedman* v. *Maryland*, 380 U. S. 51, 57–60.

[5] See, *e. g.*, *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Baggett* v. *Bullitt*, 377 U. S. 360, 372–373; *Cramp* v. *Bd. of Public Instruction*, 368 U. S. 278, 287–288.

[6] See, *e. g.*, *Staub* v. *City of Baxley*, 355 U. S. 313; *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296.

Pfister, 380 U. S. 479. We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

The vitality of First Amendment protections has, as a result, been deemed to rest in large measure upon the ability of the individual to take his chances and express himself in the face of such restraints, armed with the ability to challenge those restraints if the State seeks to penalize that expression. The most striking examples of the right to speak first and challenge later, and of peculiar moment for the present case, are the cases concerning the ability of an individual to challenge a permit or licensing statute giving broad discretion to an individual or group, such as the Birmingham permit ordinance, despite the fact that he did not attempt to obtain a permit or license. In *Staub* v. *City of Baxley*, 355 U. S. 313, the accused, prosecuted for soliciting members for an organization without a permit, contended that the ordinance was invalid on its face because it made exercise of freedom of speech contingent upon the will of the issuing authority and therefore was an invalid prior restraint—the same contention made by petitioners with regard to the Birmingham ordinance. The Georgia Court of Appeals held that "[h]aving made no effort to secure a license, the defendant is in no position to claim that any section of the ordinance is invalid or unconstitutional . . . ." *Staub* v. *City of Baxley*, *supra*, at 318. We refused to regard this holding as an adequate nonfederal ground for decision, stating, *supra*, at 319:

> "The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution

> does not preclude review in this Court of a judgment of conviction under such an ordinance. *Smith* v. *Cahoon*, 283 U. S. 553, 562; *Lovell* v. *Griffin*, 303 U. S. 444, 452. 'The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.' *Jones* v. *Opelika*, 316 U. S. 584, 602, dissenting opinion, adopted *per curiam* on rehearing, 319 U. S. 103, 104."

See also *Cox* v. *Louisiana*, 379 U. S. 536, 556–557.

Yet by some inscrutable legerdemain these constitutionally secured rights to challenge prior restraints invalid on their face are lost if the State takes the precaution to have some judge append his signature to an *ex parte* order which recites the words of the invalid statute. The State neatly insulates its legislation from challenge by mere incorporation of the identical stifling, overbroad, and vague restraints on exercise of the First Amendment freedoms into an even more vague and pervasive injunction obtained invisibly and upon a stage darkened lest it be open to scrutiny by those affected. The *ex parte* order of the judicial officer exercising broad equitable powers is glorified above the presumably carefully considered, even if hopelessly invalid, mandates of the legislative branch. I would expect this tribunal, charged as it is with the ultimate responsibility to safeguard our constitutional freedoms, to regard the *ex parte* injunctive tool to be far more dangerous than statutes to First Amendment freedoms. One would expect this Court particularly to remember the stern lesson history taught courts, in the context of the labor injunction, that the *ex parte* injunction represents the most devastating of restraints on constitutionally protected activities. Today, however, the weapon is given complete invulnerability in the one context in which the danger from broad

prior restraints has been thought to be the most acute. Were it not for the *ex parte* injunction, petitioners could have paraded first and challenged the permit ordinance later. But because of the *ex parte* stamp of a judicial officer on a copy of the invalid ordinance they are barred not only from challenging the permit ordinance, but also the potentially more stifling yet unconsidered restraints embodied in the injunction itself.

The Court's religious deference to the state court's application of the *Mine Workers'* rule in the present case is in stark contrast to the Court's approach in *In re Green,* 369 U. S. 689. The state court issued an *ex parte* injunction against certain labor picketing. Green, counsel for the union, advised the union that the order was invalid and that it should continue to picket so that the order could be tested in a contempt hearing. The court held Green in contempt without allowing any challenge to the order. This Court stated that the issue was "whether the state court was trenching on the federal domain." *In re Green, supra,* at 692. It remanded for a hearing to determine whether the activity enjoined was "arguably" subject to Labor Board jurisdiction. In *Green,* therefore, we rejected blind effectuation of the State's interest in requiring compliance with its court's *ex parte* injunctions because of the "arguable" collision with federal labor policy. Yet in the present case the Court affirms the determination of a state court which was willing to assume that its *ex parte* order and the underlying statute were repugnant on their face to the First Amendment of the Federal Constitution. One must wonder what an odd inversion of values it is to afford greater respect to an "arguable" collision with federal labor policy than an assumedly patent interference with constitutional rights so high in the scale of constitutional values that this Court has described them as being "delicate and vulnerable, as well as supremely

precious in our society." *NAACP* v. *Button*, 371 U. S. 415, 433.

It is said that petitioners should have sought to dissolve the injunction before conducting their processions. That argument is plainly repugnant to the principle that First Amendment freedoms may be exercised in the face of legislative prior restraints, and *a fortiori* of *ex parte* restraints broader than such legislative restraints, which may be challenged in any subsequent proceeding for their violation. But at all events, prior resort to a motion to dissolve this injunction could not be required because of the complete absence of any time limits on the duration of the *ex parte* order. See *Freedman* v. *Maryland*, 380 U. S. 51. Even the Alabama Supreme Court's Rule 47 leaves the timing of full judicial consideration of the validity of the restraint to that court's untrammeled discretion.

The shifting of the burden to petitioners to show the lawfulness of their conduct prior to engaging in enjoined activity also is contrary to the principle, settled by *Speiser* v. *Randall*, 357 U. S. 513, 526, that

> "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free."

The suggestion that petitioners be muffled pending outcome of dissolution proceedings without any measurable time limits is particularly inappropriate in the setting of this case. Critical to the plain exercise of the right of protest was the timing of that exercise. First, the marches were part of a program to arouse community

support for petitioners' assault on segregation there. A cessation of these activities, even for a short period, might deal a crippling blow to petitioners' efforts. Second, in dramatization of their cause, petitioners, all ministers, chose April 12, Good Friday, and April 14, Easter Sunday, for their protests hoping to gain the attention to their cause which such timing might attract. Petitioners received notice of the order April 11. The ability to exercise protected protest at a time when such exercise would be effective must be as protected as the beliefs themselves. Cf. *Ex parte Jackson,* 96 U. S. 727, 733; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 248–250; *Lovell* v. *Griffin,* 303 U. S. 444, 452. It is a flagrant denial of constitutional guarantees to balance away this principle in the name of "respect for judicial process." To preach "respect" in this context is to deny the right to speak at all.

The Court today lets loose a devastatingly destructive weapon for infringement of freedoms jealously safeguarded not so much for the benefit of any given group of any given persuasion as for the benefit of all of us. We cannot permit fears of "riots" and "civil disobedience" generated by slogans like "Black Power" to divert our attention from what is here at stake—not violence or the right of the State to control its streets and sidewalks, but the insulation from attack of *ex parte* orders and legislation upon which they are based even when patently impermissible prior restraints on the exercise of First Amendment rights, thus arming the state courts with the power to punish as a "contempt" what they otherwise could not punish at all. Constitutional restrictions against abridgments of First Amendment freedoms limit judicial equally with legislative and executive power. Convictions for contempt of court orders which invalidly abridge First Amendment freedoms must be condemned equally with convictions for violation of statutes which do the same thing. I respectfully dissent.

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UNITED STATES *v.* SEALY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 9. Argued April 20, 1967.—Decided June 12, 1967.

The United States brought this civil action for violation of § 1 of the Sherman Act against appellee, the owner of the trademarks for Sealy branded mattresses and bedding products which it licensed manufacturers in various parts of the country to produce and sell under a territorial allocation system. Sealy agreed with each licensee not to license anyone else to manufacture or sell in a designated area and the licensee agreed not to manufacture or sell Sealy products outside that area. The Sealy licensees own substantially all appellee's stock and control its day-to-day operations, including the assignment and termination of the exclusive territorial licenses. Appellee was charged with conspiring with its licensees to fix the prices at which their retail customers might resell Sealy products and to allocate mutually exclusive territories among the licensees. The District Court after trial enjoined appellee from price fixing and no appeal was taken. It also ruled that Sealy's allocation of territories to its licensees did not violate § 1, and the Government appealed from that holding. *Held:*

1. The territorial allocations here are not vertical arrangements imposed by the licensor but horizontal restraints arranged by the licensees. "Sealy was a joint venture of, by, and for its stockholder-licensees . . . and [they] are themselves directly, without even the semblance of insulation, in charge of Sealy's operations." *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), distinguished. Pp. 352–354.

2. The territorial restraints were a part of the unlawful price-fixing and policing activities of Sealy operating as an instrumentality of the licensees and constituted "an aggregation of trade restraints" which was illegal *per se*. Pp. 354–358.

Reversed.

Daniel M. Friedman argued the cause for the United States. On the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Richard A. Posner* and *Robert B. Hummel.*

Richard W. McLaren argued the cause for appellee. With him on the brief were *John T. Chadwell, Richard S. Rhodes* and *David L. Aufderstrasse.*

Sigmund Timberg and *Lionel G. Gross* filed a brief for Serta Associates, Inc., et al., as *amici curiae,* urging affirmance.

Carlton Hill filed a brief for the Restonic Corporation, as *amicus curiae.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

Appellee and its predecessors have, for more than 40 years, been engaged in the business of licensing manufacturers of mattresses and bedding products to make and sell such products under the Sealy name and trademarks. In this civil action the United States charged that appellee had violated § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, by conspiring with its licensees to fix the prices at which the retail customers of the licensees might resell bedding products bearing the Sealy name, and to allocate mutually exclusive territories among such manufacturer-licensees.

After trial, the District Court found that the appellee was engaged in a continuing conspiracy with its manufacturer-licensees to agree upon and fix minimum retail prices on Sealy products and to police the prices so fixed. It enjoined the appellee from such conduct, "Provided, however, that nothing herein contained shall be construed to prohibit the defendant from disseminating and using suggested retail prices for the purpose of national advertising of Sealy products." Appellee did not appeal the finding or order relating to price-fixing.

With respect to the charge that appellee conspired to allocate mutually exclusive territory among its manufacturers, the District Court held that the United States had not proved conduct "in unreasonable restraint of

trade in violation of Section 1 of the Sherman Act." The United States appealed under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We noted probable jurisdiction. 382 U. S. 806 (1965).

There is no dispute that exclusive territories were allotted to the manufacturer-licensees. Sealy agreed with each licensee not to license any other person to manufacture or sell in the designated area; and the licensee agreed not to manufacture or sell "Sealy products" outside the designated area. A manufacturer could make and sell his private label products anywhere he might choose.

Because this Court has distinguished between horizontal and vertical territorial limitations for purposes of the impact of the Sherman Act, it is first necessary to determine whether the territorial arrangements here are to be treated as the creature of the licensor, Sealy, or as the product of a horizontal arrangement among the licensees. *White Motor Co.* v. *United States*, 372 U. S. 253 (1963).

If we look at substance rather than form, there is little room for debate. These must be classified as horizontal restraints. Compare *United States* v. *General Motors*, 384 U. S. 127, 141–148 (1966); *id.*, at 148–149 (HARLAN, J., concurring in the result); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960).

There are about 30 Sealy "licensees." They own substantially all of its stock.[1] Sealy's bylaws provide that each director must be a stockholder or a stockholder-licensee's nominee. Sealy's business is managed and controlled by its board of directors. Between board meetings, the executive committee acts. It is composed of Sealy's president and five board members, all licensee-

[1] A nonlicensee, Bergmann, who was Sealy's president in the 1950's, owns some of the remaining stock; stockholders have preemptive rights.

stockholders. Control does not reside in the licensees only as a matter of form. It is exercised by them in the day-to-day business of the company including the grant, assignment, reassignment, and termination of exclusive territorial licenses. Action of this sort is taken either by the board of directors or the executive committee of Sealy, both of which, as we have said, are manned, wholly or almost entirely, by licensee-stockholders.

Appellee argues that "there is no evidence that Sealy is a mere creature or instrumentality of its stockholders." In support of this proposition, it stoutly asserts that "the stockholders and directors wore a 'Sealy hat' when they were acting on behalf of Sealy." But the obvious and inescapable facts are that Sealy was a joint venture of, by, and for its stockholder-licensees; and the stockholder-licensees are themselves directly, without even the semblance of insulation, in charge of Sealy's operations.

For example, some of the crucial findings of the District Court describe actions as having been taken by "stockholder representatives" acting as the board or a committee.

It is true that the licensees had an interest in Sealy's effectiveness and efficiency, and, as stockholders, they welcomed its profitability—at any rate within the limits set by their willingness as licensees to pay royalties to the joint venture. But that does not determine whether they as licensees are chargeable with action in the name of Sealy. We seek the central substance of the situation, not its periphery;[2] and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats. The arrangements for

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[2] Cf., *e. g., Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593 (1951); *United States* v. *General Motors,* 384 U. S. 127 (1966); *United States* v. *New Wrinkle, Inc.,* 342 U. S. 371 (1952); *United States* v. *American Tobacco Co.,* 221 U. S. 106 (1911).

exclusive territories are necessarily chargeable to the licensees of appellee whose interests such arrangements were supposed to promote and who, through select members, guaranteed or withheld and had the power to terminate licenses for inadequate performance. The territorial arrangements must be regarded as the creature of horizontal action by the licensees. It would violate reality to treat them as equivalent to territorial limitations imposed by a manufacturer upon independent dealers as incident to the sale of a trademarked product. Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation. It is not the principal.

Accordingly, this case is to be distinguished from *White Motor Co.* v. *United States, supra,* which involved a vertical territorial limitation. In that case, this Court pointed out that vertical restraints were not embraced within the condemnation of horizontal territorial limitations in *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593 (1951), and, prior to trial on summary judgment proceedings, the Court declined to extend *Timken* "to a *vertical* arrangement by one manufacturer restricting the territory of his distributors or dealers." 372 U. S., at 261.

Timken involved agreements between United States, British, and French companies for territorial division among themselves of world markets for antifriction bearings. The agreements included fixing prices on the products of one company sold in the territory of the others; restricting imports to and exports from the United States; and excluding outside competition. This Court held that the "aggregation of trade restraints such as those existing in this case are illegal under the [Sherman] Act." 341 U. S., at 598.

In the present case, we are also faced with an "aggregation of trade restraints." Since the early days of the

company in 1925 and continuously thereafter, the prices to be charged by retailers to whom the licensee-stockholders of Sealy sold their products have been fixed and policed by the licensee-stockholders directly, by Sealy itself, and by collaboration between them. As the District Court found:

> "the stockholder-licensee representatives . . . as the board of directors, the Executive Committee, or other committees of Sealy, Inc. . . . discuss, agree upon and set
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> "(a) The retail prices at which Sealy products could be sold;
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> "(b) The retail prices at which Sealy products could be advertised;
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> "(c) The comparative retail prices at which the stockholder-licensees and the Sealy retailers could advertise Sealy products;
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> "(d) The minimum retail prices below which Sealy products could not be advertised;
>
> "(e) The minimum retail prices below which Sealy products could not be sold; and
>
> "(f) The means of inducing and enforcing retailers to adhere to these agreed upon and set prices."

These activities, as the District Court held, constitute a violation of the Sherman Act. Their anticompetitive nature and effect are so apparent and so serious that the courts will not pause to assess them in light of the rule of reason. See, *e. g., United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 210–218 (1940); *United States* v. *General Motors,* 384 U. S. 127, 147 (1966).

Appellee has not appealed the order of the District Court enjoining continuation of this price-fixing, but the existence and impact of the practice cannot be ignored in our appraisal of the territorial limitations. In the first place, this flagrant and pervasive price-fixing,

in obvious violation of the law, was, as the trial court found, the activity of the "stockholder representatives" acting through and in collaboration with Sealy mechanisms. This underlines the horizontal nature of the enterprise, and the use of Sealy, not as a separate entity, but as an instrumentality of the individual manufacturers. In the second place, this unlawful resale price-fixing activity refutes appellee's claim that the territorial restraints were mere incidents of a lawful program of trademark licensing. Cf. *Timken Roller Bearing Co.* v. *United States, supra.*[3] The territorial restraints were a part of the unlawful price-fixing and policing. As specific findings of the District Court show, they gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions. It may be true, as appellee vigorously argues, that territorial exclusivity served many other purposes. But its connection with the unlawful price-fixing is enough to require that it be

[3] In *Timken,* as in the present case, it was argued that the restraints were reasonable steps incident to a valid trademark licensing system. But the Court summarily rejected the argument, as we do here. It pointed out that the restraints went far beyond the protection of the trademark and included nontrademarked items, and it concluded that: "A trademark cannot be legally used as a device for Sherman Act violation." 341 U. S., at 599. Cf. § 33 of the Lanham Act, 60 Stat. 438, as amended, 15 U. S. C. § 1115 (b)(7). In *Timken,* the restraints covered nonbranded merchandise as well as the "Timken" line. In the present case the restraints were in terms of "Sealy products" only. As to their private label products, the licensees were free to sell outside of the given territory and, so far as appears, without resale price collaboration or enforcement. But this difference in fact is not consequential in this case. A restraint such as is here involved of the resale price of a trademarked article, not otherwise permitted by law, cannot be defended as ancillary to a trademark licensing scheme. Cf. also *United States* v. *General Motors,* 384 U. S. 127, 142–143 (1966).

condemned as an unlawful restraint and that appellee be effectively prevented from its continued or further use.

It is urged upon us that we should condone this territorial limitation among manufacturers of Sealy products because of the absence of any showing that it is unreasonable. It is argued, for example, that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to the use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition, and should not be condemned as *per se* unlawful. But condemnation of appellee's territorial arrangements certainly does not require us to go so far as to condemn that quite different situation, whatever might be the result if it were presented to us for decision.[4] For here, the arrangements for territorial limitations are part of "an aggregation of trade restraints" including unlawful price-fixing and policing. *Timken Roller Bearing Co.* v. *United States, supra,* 341 U. S., at 598. Compare *United States* v. *General Motors,* 384 U. S. 127, 147–148 (1966).[5] Within settled doctrine, they are unlawful under § 1 of the Sherman Act without the necessity for an inquiry

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[4] Cf. *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 6–7 (1958): "As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

[5] Mr. Justice Harlan observed, concurring in the result in *United States* v. *General Motors,* 384 U. S. 127, 148–149, that "Although *Parke Davis* related to alleged price-fixing, I have been unable to discern any tenable reason for differentiating it from a case involving, as here, alleged boycotting." The same conclusion would seem to apply with respect to an alleged market division, which, like price-fixing, group boycotts, and tying arrangements, has been held to be a *per se* violation of the Sherman Act. *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5 (1958).

in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness.

Accordingly, the judgment of the District Court is reversed and the case remanded for the entry of an appropriate decree.

MR. JUSTICE CLARK and MR. JUSTICE WHITE took no part in the decision of this case.

MR. JUSTICE HARLAN, dissenting.

I cannot agree that on this record the restrictive territorial arrangements here challenged are properly to be classified as "horizontal," and hence illegal *per se* under established antitrust doctrine. I believe that they should be regarded as "vertical" and thus, as the Court recognizes, subject to different antitrust evaluation.

Sealy, Inc., is the owner of trademarks for Sealy branded bedding. Sealy licenses manufacturers in various parts of the country to produce and sell its products. In addition, Sealy provides technical and managerial services for them, conducts advertising and other promotional programs, and engages in technical research and quality control activities. The Government's theory of this case in the District Court was essentially that the allocation of territories by Sealy to its various licensees was unlawful *per se* because in spite of these other legitimate activities Sealy was actually a "front" created and used by the various manufacturers of Sealy products "to camouflage their own collusive activities . . . ." Plaintiff's Brief in Opposition to Defendants' Briefs, October 12, 1961, pp. 12, 15.

If such a characterization of Sealy had been proved at trial I would agree that the division of territories is illegal *per se*. Horizontal agreements among manufacturers to divide territories have long been held to violate the anti-

trust laws without regard to any asserted justification for them. See *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211; *United States* v. *National Lead Co.,* 332 U. S. 319; *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593. The reason is that territorial divisions prevent open competition, and where they are effected horizontally by manufacturers or by sellers who in the normal course of things would be competing among themselves, such restraints are immediately suspect. As the Court noted in *White Motor Co.* v. *United States,* 372 U. S. 253, 263, they are "naked restraints of trade with no purpose except stifling of competition." On the other hand, vertical restraints—that is, limitations imposed by a manufacturer on his own dealers, as in *White Motor Co., supra,* or by a licensor on his licensees—may have independent and valid business justifications. The person imposing the restraint cannot necessarily be said to be acting for anticompetitive purposes. Quite to the contrary, he can be expected to be acting to enhance the competitive position of his product *vis-à-vis* other brands.

With respect to vertical restrictions, it has long been recognized that in order to engage in effective *interbrand* competition, some limitations on *intrabrand* competition may be necessary. Restraints of this type "may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business (cf. *Brown Shoe* [v. *United States,* 370 U. S. 294], at 330; *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 560–561, aff'd, 365 U. S. 567) and within the 'rule of reason,' " *White Motor Co., supra,* at 263; see also *id.,* at 267–272 (concurring opinion of BRENNAN, J.). For these reasons territorial limitations imposed vertically should be tested by the rule of reason, namely, whether in the context of the particular industry, "the restraint imposed is such as merely regulates and perhaps thereby promotes competition or

whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. Indeed the Court reaffirms these principles in the opinion which it announces today in *United States* v. *Arnold, Schwinn & Co., post*, p. 365.

The question in this case is whether Sealy is properly to be regarded as an independent licensor which, as a prima facie matter, can be deemed to have imposed these restraints on its licensees for its own business purposes, or as equivalent to a horizontal combination of licensees, that is as simply a vehicle for effectuating horizontal arrangements between its licensees. On the basis of the findings made by the District Court, I am unable to accept the Court's classification of these restraints as horizontally contrived. The District Court made the following findings:

> "84. The preceding [detailed factual] findings indicate the type of evidence in this record that demonstrates that there has never been a central conspiratorial purpose on the part of Sealy and its licensees to divide the United States into territories in which competitors would not compete. Their main purpose has been the proper exploitation of the Sealy name and trademarks by licensing bedding manufacturers to manufacture and sell Sealy products in exchange for royalties to Sealy. The fact remains that each licensee was restricted in the territory in which he could manufacture and sell Sealy products. However, the record shows that this restriction was imposed by Sealy and was also secondary, or ancillary, to the main purpose of Sealy's license contracts.
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> . . . . .
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> "119. Plaintiff's evidence, read as a whole, conclusively proves that the Sealy licensing arrangements were developed in the early 1920's for entirely

> legitimate business purposes, including royalty income to Sugar Land Industries, which owned the Sealy name, trademarks and patents, and the benefits to licensees of joint purchasing, research, engineering, advertising and merchandising. These objectives were carried out by successor companies, including defendant, whose activities have been directed not toward market division among licensees but toward obtaining additional licensees and more intensive sales coverage."

The Solicitor General in presenting the appeal to this Court stated explicitly that he did *not* contend "that Sealy, Inc. was no more than a facade for a conspiracy to suppress competition," Brief, p. 12, since it admittedly did have genuine and lawful purposes. For me these District Court findings, which the Government accepts for purposes of this appeal, take this case out of the category of horizontal agreements, and thus out of the *per se* category as well.[1] Sealy has wholly legitimate interests and purposes of its own: it is engaged in vigorous interbrand competition with large integrated bedding manufacturers and with retail chains selling their own products.[2] Sealy's goal is to maximize sales of its prod-

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[1] Compare *United States* v. *General Motors*, 384 U. S. 127, where the undisputed facts as found by the District Court, *id.*, at 140–141, proved a horizontal conspiracy among Chevrolet dealers to initiate and police a boycott of sales by dealers to discount houses. It is precisely because no such horizontal impetus was shown to exist here that I view this case differently. See my opinion concurring in the result in *General Motors*, 384 U. S., at 148.

[2] The District Court made no findings as to the position of Sealy in the bedding industry, but on the basis of testimony introduced and not seriously contravened it appears that Sealy products are by no means the largest selling bedding products, that Sealy manufacturers have many competitors both nationwide and local, and that advertising—particularly nationwide advertising—is an important competitive factor in the industry.

ucts nationwide, and thus to maximize its royalties. The test under such circumstances should be the same as that governing other vertical relationships, namely, whether in the context of the market structure of this industry, these territorial restraints are reasonable business practices, given the true purposes of the antitrust laws. See *White Motor Co., supra; Sandura Co.* v. *FTC*, 339 F. 2d 847. It is true that in this case the shareholders of Sealy are the licensees. Such a relationship no doubt requires special scrutiny.[3] But I cannot agree that this fact by itself *automatically* requires striking down Sealy's policy of territorialization. The correct approach, in my view, is to consider Sealy's corporate structure and decision-making process as one (but only one) relevant factor in determining whether the restraint is an unreasonable one. Compare *United States* v. *Penn-Olin Chem. Co.*, 378 U. S. 158, 170.

The Court in reaching its result relies heavily on the fact that these territorial limitations were part of "an 'aggregation of trade restraints,' " *ante*, p. 354, because the District Court has held that appellee did violate the Sherman Act by engaging in unlawful price fixing. "The territorial restraints," the Court says, "were a part of the unlawful price-fixing and policing," *ante*, p. 356. Noth-

[3] The Sealy trademark was originally owned by Sugar Land Industries, and its products were manufactured by a subsidiary, Sealy Mattress Co. In the 1920's independent manufacturers were licensed to produce Sealy products, and in 1925 Sugar Land sold the trademarks to a new corporation, Sealy Corp., owned by one E. E. Edwards and the various Sealy licensees. In 1933, when the economic depression eliminated a number of Sealy producers, the corporation was reorganized into the present Sealy, Inc. At present there are about 30 licensees owning approximately 90% of the stock. This joint-venture approach was created and maintained, the District Court found, "for entirely legitimate business purposes," such as obtaining the benefits "of joint purchasing, research, engineering, advertising and merchandising." Finding 119.

ing, however, in the findings of the District Court supports this conclusion. Indeed, the opposite conclusion is the more tenable one since the District Court that found Sealy guilty of price fixing found at the same time that it had not unlawfully conspired to allocate territories. The Government has not contended here that it is entitled to an injunction against territorial restrictions as a part of its relief in the price-fixing aspect of the case. The price-fixing issue was not appealed to this Court, and we can assume that the Government will obtain adequate and effective injunctive relief from the District Court. For these reasons the Court's "aggregation of trade restraints" theory seems to me ill-conceived.

I find nothing in the Court's opinion that persuades me to abandon the traditional "rule of reason" approach to this type of business practice in the context of the facts found by the trial court. The District Court, however, made no findings in respect to this theory for judging liability since the Government insisted on trying the case in *per se* terms, attempting to prove only a horizontal conspiracy. Although Sealy did introduce some evidence concerning the bedding industry, the territorialization issue was not tried in the terms of the reasonableness of the territorial restrictions. A motion to suppress Sealy's subpoena seeking discovery with respect to one of its leading competitors was successfully supported by the Government,[4] and no evidence directly aimed at

[4] See *United States* v. *Serta Associates, Inc.*, 29 F. R. D. 136, where in a companion action against another licensor of bedding products a similar subpoena was quashed after it was opposed by the Government. The District Court there noted: "The complaint alleges price fixing and market allocations by Serta, which it has denied. Defendant alleges the agreements made were reasonable ancillary restraints, valid under the Sherman Act, and the evidence sought by this subpoena would completely corroborate the reasonableness. The plaintiff, the Government, has also filed a brief sup-

justifying territorial limitations as a reasonable method of competition in the bedding industry was taken. Accordingly, the District Court made no findings as to such justification.

Although in the normal course of things I would have voted to remand the case for further proceedings and findings under the correct rules of law, I believe that since the Government deliberately chose to stand on its *per se* approach, and did not prevail, it should not be able to relitigate the case on an alternative theory, especially when it opposed appellee's efforts to present the case that way.

I would affirm the dismissal of this aspect of the case by the District Court.

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portive of the motion to quash the subpoena. It asserts that the complaint raises per se violations of the Sherman Act which fact renders completely irrelevant the subpoenaed material, tending to confirm the reasonableness of defendant's conduct."

Syllabus.

UNITED STATES *v.* ARNOLD, SCHWINN & CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 25. Argued April 20, 1967.—Decided June 12, 1967.

This is a civil antitrust suit under § 1 of the Sherman Act in which appellees were charged by the Government with a continuing conspiracy, with others, to fix prices, to allocate exclusive territories to wholesalers and jobbers, and to confine merchandise to franchised dealers. Appellees are Arnold, Schwinn & Co. (Schwinn), a leading bicycle manufacturer, and an association of distributors handling Schwinn products. In 1951, Schwinn had the largest share, 22.5%, of the U. S. bicycle market. By 1961 its share had fallen to 12.8%, although dollar and unit sales had risen. The market leader, with 22.8% in 1961, which had increased its share from 11.6% in 1951, sells mainly to mass merchandisers. Schwinn sells to (1) distributors, (2) retailers by means of consignment or agency arrangements with distributors, and (3) retailers under the Schwinn Plan, which involves direct shipment to retailers with Schwinn invoicing the dealers, extending credit, and paying a commission to the distributor taking the order. Schwinn assigned specific territories to each of its wholesale distributors who were instructed to sell only to franchised dealers in their respective territories. The District Court rejected the charge of price-fixing, held that the Schwinn franchising system was fair and reasonable, but that the territorial limitation was unlawful *per se* as respects products sold by Schwinn to its distributors. The United States did not appeal from the rejection of the price-fixing charge, and appellees did not appeal from the order invalidating restraints on resale by distributors who purchase products from Schwinn. The Government requests that the limitations on distribution where the distributor acts as agent or consignee of Schwinn or on the Schwinn Plan be considered under the "rule of reason" and that they be held to constitute an unreasonable restraint of trade. *Held:*

1. The promotion of Schwinn's self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. "It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory concern with

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the preservation and promotion of competition that protection is achieved." P. 375.

2. It is "illogical and inconsistent to forbid territorial limitations on resales by distributors where the distributor owns the goods . . . and, at the same time, to exonerate arrangements which require distributors to confine resales of the goods they have bought to 'franchised' retailers." Pp. 377–378.

(a) The decree should be revised on remand to "enjoin any limitation upon the freedom of distributors to dispose of the Schwinn products, which they have bought from Schwinn, where and to whomever they choose." P. 378.

(b) Since this principle is equally applicable to sales to retailers, "the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products." P. 378.

3. "Where the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from that of an agent or salesman of the manufacturer, it is only if the impact of the confinement is 'unreasonably' restrictive of competition that a violation of § 1" of the Sherman Act results from such confinement, absent culpable price-fixing. Pp. 380–381.

(a) While a manufacturer's adoption "of an agency or consignment pattern and the Schwinn type of restrictive distribution system" would not be "justified in any and all circumstances by the presence of the competition of mass merchandisers and by the demonstrated need of the franchise system to meet that competition," in the absence of price-fixing and with an adequate source of alternative products to meet the needs of the unfranchised, the vertically imposed distribution restraints may not be held to be *per se* violations of the Sherman Act. P. 381.

(b) As long as Schwinn retains all indicia of ownership and the dealers' activities are indistinguishable from those of agents or salesmen, Schwinn's franchising of retailers and confinement of retail sales to them do not constitute an "unreasonable" restraint of trade. P. 381.

237 F. Supp. 323, reversed and remanded.

Richard A. Posner argued the cause for the United States. With him on the brief were *Solicitor General*

Marshall, Assistant Attorney General Turner and *Howard E. Shapiro.*

Robert C. Keck argued the cause for appellee Arnold, Schwinn & Co. With him on the brief were *Harold D. Burgess* and *James G. Hiering. Earl E. Pollock* argued the cause and filed a brief for appellee Schwinn Cycle Distributors Association.

MR. JUSTICE FORTAS delivered the opinion of the Court.

The United States brought this appeal to review the judgment of the District Court in a civil antitrust case alleging violations of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. Direct appeal is authorized by § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. The complaint charged a continuing conspiracy since 1952 between defendants and other alleged co-conspirators involving price fixing, allocation of exclusive territories to wholesalers and jobbers, and confinement of merchandise to franchised dealers. Named as defendants were Arnold, Schwinn & Company ("Schwinn"), the Schwinn Cycle Distributors Association ("SCDA"), and B. F. Goodrich Company ("B. F. Goodrich").[1]

At trial, the United States asserted that not only the price fixing but also Schwinn's methods of distribution were illegal *per se* under § 1 of the Sherman Act. The trial lasted 70 days. The evidence, largely offered by appellees, elaborately sets forth information as to the total market interaction and interbrand competition, as well as the distribution program and practices.

The District Court rejected the charge of price fixing. With respect to the charges of illegal distribution practices, the court held that the territorial limitation was

[1] B. F. Goodrich negotiated a consent decree with the Government prior to trial, and dropped out of the case.

unlawful *per se* as respects products *sold* by Schwinn to its distributors; but that the limitation was not unlawful insofar as it was incident to sales by Schwinn itself to franchised retailers where the wholesaler or jobber (hereinafter referred to as the distributor) functioned as agent or consignee, including distribution pursuant to the "Schwinn Plan" described below.

The United States did not appeal from the District Court's rejection of its price-fixing charge. The appellees did not appeal from the findings and order invalidating restraints on resale by distributors who *purchase* products from Schwinn.

In this Court, the United States has abandoned its contention that the distribution limitations are illegal *per se*. Instead we are asked to consider these limitations in light of the "rule of reason," and, on the basis of the voluminous record below, to conclude that the limitations are the product of "agreement" between Schwinn and its wholesale and retail distributors and that they constitute an unreasonable restraint of trade.

Appellee Schwinn is a family-owned business which for many years has been engaged in the manufacture and sale of bicycles and some limited bicycle parts and accessories.[2] Appellee SCDA is an association of distributors handling Schwinn bicycles and other products. The challenged marketing program was instituted in 1952. In 1951 Schwinn had the largest single share of the United States bicycle market—22.5%. In 1961 Schwinn's share of market had fallen to 12.8% although its dollar and unit sales had risen substantially. In the same period, a competitor, Murray Ohio Manufacturing Company, which is now the leading United States bicycle

[2] Its parts and accessory business is less than 4% of its total sales. Like other bicycle producers, Schwinn manufactures the basic parts of its bicycles and purchases components from parts producers.

producer, increased its market share from 11.6% in 1951 to 22.8% in 1961. Murray sells primarily to Sears, Roebuck & Company and other mass merchandisers. By 1962 there were nine bicycle producers in the Nation, operating 11 plants. Imports of bicycles amounted to 29.7% of sales in 1961.

Forty percent of all bicycles are distributed by national concerns which operate their own stores and franchise others. Another 20% are sold by giant chains and mass merchandisers like Sears and Montgomery Ward & Company. Sears and Ward together account for 20% of all bicycle sales. Most of these bicycles are sold under private label. About 30% of all bicycles are distributed by cycle jobbers which specialize in the trade, and the remaining 10% by hardware and general stores.

Schwinn sells its products primarily to or through 22 wholesale distributors, with sales to the public being made by a large number of retailers. In addition, it sells about 11% of its total to B. F. Goodrich for resale in B. F. Goodrich retail or franchised stores. There are about 5,000 to 6,000 retail dealers in the United States which are bicycle specialty shops, generally also providing servicing. About 84% of Schwinn's sales are through such specialized dealers. Schwinn sells only under the Schwinn label, never under private label, while about 64% of all bicycles are sold under private label. Distributors and retailers handling Schwinn bicycles are not restricted to the handling of that brand. They may and ordinarily do sell a variety of brands.

The United States does not contend that there is in this case any restraint on interbrand competition, nor does it attempt to sustain its charge by reference to the market for bicycles as a whole. Instead, it invites us to confine our attention to the intrabrand effect of the contested restrictions. It urges us to declare that the

method of distribution of a single brand of bicycles, amounting to less than one-seventh of the market, constitutes an unreasonable restraint of trade or commerce among the several States.

Schwinn's principal methods of selling its bicycles are as follows: (1) sales to distributors, primarily cycle distributors, B. F. Goodrich and hardware jobbers; (2) sales to retailers by means of consignment or agency arrangements with distributors; and (3) sales to retailers under the so-called Schwinn Plan which involves direct shipment by Schwinn to the retailer with Schwinn invoicing the dealers, extending credit, and paying a commission to the distributor taking the order. Schwinn fair-traded certain of its models at retail in States permitting this, and suggested retail prices for all of its bicycles in all States. During the 1952–1962 period, as the District Court found, "well over half of the bicycles sold by Schwinn have been sold direct to the retail dealer (not to a cycle distributor) by means of Schwinn Plan sales and consignment and agency sales." Less than half were sold to distributors.[3]

After World War II, Schwinn had begun studying and revamping its distribution pattern. As of 1951–1952, it had reduced its mailing list from about 15,000 retail outlets to about 5,500. It instituted the practice of franchising approved retail outlets. The franchise did not prevent the retailer from handling other brands, but it did require the retailer to promote Schwinn bicycles and to give them at least equal prominence with competing brands. The number of franchised dealers in any area was limited, and a retailer was franchised only as to a designated location or locations. Each franchised dealer

[3] Schwinn's brief represents that presently about 75% of all Schwinn sales are now made under the Schwinn Plan; that there are no longer any consignment agreements; and that only two cycle distributors remain under agency contract.

was to purchase only from or through the distributor authorized to serve that particular area. He was authorized to sell only to consumers, and not to unfranchised retailers. The District Court found that while each Schwinn franchised retailer "knows that he is an unrestricted retail dealer, free to sell at his own price to any person who wants to buy on a retail basis. . . . [He] knows also that he is not a wholesaler and that he cannot sell as a wholesaler or act as an agent for some other unfranchised dealer, such as a discount house retailer . . . . When he acts as such an agent he subjects his franchise to cancellation at will by Schwinn."

Schwinn assigned specific territories to each of its 22 wholesale cycle distributors. These distributors were instructed to sell only to franchised Schwinn accounts and only in their respective territories which were specifically described and allocated on an exclusive basis. The District Court found "that certain cycle distributors have in fact not competed with each other . . . and that in so doing they have conspired with Schwinn to unreasonably restrain competition contrary to the provisions of Section 1 of the Sherman Act." The court, however, restricted this finding and its consequent order to transactions in which the distributor *purchased* the bicycles from Schwinn for resale, as distinguished from sales by the distributor as agent or consignee of Schwinn or on the Schwinn Plan. The United States urges that this Court should require revision of the decree in this respect to forbid territorial exclusivity regardless of the technical form by which the products are transferred from Schwinn to the retailer or consumer.[4]

[4] The United States did not perfect this point below, and its Jurisdictional Statement in this Court did not expressly request revision of the decree. Appellees strenuously urge that we should for these reasons refuse to consider the United States' present argument that the decree should be enlarged as stated. See Supreme

The District Court rejected the Government's contention that Schwinn had in fact canceled the franchises of some retailers because of sales to discount houses or other unfranchised dealers, nor did it find that distributors have been cut off because of sales to unfranchised retailers or violation of territorial limitations. The United States urges that this is "clearly erroneous." In any event, it is clear and entirely consistent with the District Court's findings that Schwinn has been "firm and resolute" in insisting upon observance of territorial and customer limitations by its bicycle distributors and upon confining sales by franchised retailers to consumers, and that Schwinn's "firmness" in these respects was grounded upon the communicated danger of termination. Our analysis will embrace this conclusion, rather than the finding which is urged by the Government and which was refused by the trial court that Schwinn actually terminated retail franchises or cut off distributors for the suggested reasons.

We come, then, to the legal issues in this case. We are here confronted with challenged vertical restrictions as to territory and dealers. The source of the restrictions is the manufacturer. These are not horizontal restraints, in which the actors are distributors with or without the manufacturer's participation. We have held in such a case, where the purpose was to prevent the distribution of automobiles to or by "discounters," that a "classic conspiracy in restraint of trade" results.

Court Rules 15 (1)(c)(1) and 40 (1)(d)(2); *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 177–179 (1938). While we regard with disfavor the Government's practice in this case, both with respect to the point here at issue and its change of theory, in view of the nature and importance of the case, we shall not reject the tendered issues because the request for the substance of the relief was embraced in the question presented in the Jurisdictional Statement and because appellees have not been adversely affected.

United States v. *General Motors Corp.*, 384 U. S. 127 (1966); see also *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951). Nor is this a case of territorial or dealer restrictions accompanied by price fixing, for here the issue of unlawful price fixing was tendered, litigated, decided against the appellant, and appellant has not appealed. If it were otherwise—if there were here a finding that the restrictions were part of a scheme involving unlawful price fixing, the result would be a *per se* violation of the Sherman Act. *United States* v. *Sealy, Inc.*, *ante*, p. 350; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724 (1944). Because of the posture of the case and the failure of the Government to urge the point, we do not here pause to consider whether a case might be presented, short of unlawful price fixing, in which the activities of the manufacturer to affect resale prices—whether styled price "maintenance" or "stabilization" or otherwise—would fatally infect vertical customer restrictions so as to require a conclusion of *per se* violation. The Government does not contend that a *per se* violation of the Sherman Act is presented by the practices which are involved in this appeal (that is, without reference to the practice which the lower court enjoined and which is not before us). Accordingly, we are remitted to an appraisal of the market impact of these practices.

In *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), this Court refused to affirm summary judgment against the manufacturer even though there were not only vertical restrictions as to territory and customer selection but also unlawful price fixing. The Court held that there was no showing that the price fixing was "an integral part of the whole distribution system" and accordingly it declined to outlaw the system because of the possibility that a trial laying bare "the economic

and business stuff out of which these arrangements emerge" might demonstrate their reasonableness. *Id.*, at 263. So here we must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not "reasonable" in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry. *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238 (1918); *Standard Oil Co.* v. *United States,* 221 U. S. 1, 51 (1911); *Apex Hosiery* v. *Leader,* 310 U. S. 469, 498 (1940).[5]

We first observe that the facts of this case do not come within the specific illustrations which the Court in *White Motor* articulated as possible factors relevant to a showing that the challenged vertical restraint is sheltered by the rule of reason because it is not anticompetitive. Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a "failing company." On the contrary, at the initiation of these practices, it was the leading bicycle producer in the Nation. Schwinn contends, however, and the trial court found, that the reasons which induced it to adopt the challenged distribution program were to enable it and the small, independent merchants that made up its chain of distribution to compete more effectively in the marketplace. Schwinn

[5] The United States, having abandoned its contention that the restraints in the present case are *per se* violations of the Sherman Act, now urges "a standard of presumptive illegality," presumably on the basis of a showing that a product has been distributed by means of arrangements for territorial exclusivity and restricted retail and wholesale customers. We do not consider this additional subtlety which was not advanced in the trial court. The burden of proof in antitrust cases remains with the plaintiff, deriving such help as may be available in the circumstances from particularized rules articulated by law—such as the *per se* doctrine. Cf. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 179 (1931).

sought a better way of distributing its product: a method which would promote sales, increase stability of its distributor and dealer outlets, and augment profits. But this argument, appealing as it is, is not enough to avoid the Sherman Act proscription; because, in a sense, every restrictive practice is designed to augment the profit and competitive position of its participants. Price fixing does so, for example, and so may a well-calculated division of territories. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). The antitrust outcome does not turn merely on the presence of sound business reason or motive. Here, for example, if the test of reasonableness were merely whether Schwinn's restrictive distribution program and practices were adopted "for good business reasons" and not merely to injure competitors, or if the answer turned upon whether it was indeed "good business practice," we should not quarrel with Schwinn's eloquent submission or the finding of the trial court. But our inquiry cannot stop at that point. Our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations, the effect upon competition in the marketplace is substantially adverse. The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved. *Chicago Board of Trade, supra,* at 238.

On this basis, restraints as to territory or customers, vertical or horizontal, are unlawful if they are "ancillary to the price-fixing" (*White Motor Co.* v. *United States, supra,* at 260) or if the price fixing is "an integral part of the whole distribution system." (*Bausch & Lomb, supra,* at 720.) In those situations, it is needless to inquire fur-

ther into competitive effect because it is established doctrine that, unless permitted by statute, the fixing of prices at which others may sell is anticompetitive, and the unlawfulness of the price fixing infects the distribution restrictions. Cf. *Sealy, supra,* and *Bausch & Lomb, supra.* At the other extreme, a manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. Cf. *United States* v. *Colgate & Co.,* 250 U. S. 300 (1919). If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act. It is within these boundary lines that we must analyze the present case.

The District Court here enjoined appellees from limiting the territory within which any wholesaler or jobber may sell any Schwinn product which it has purchased. It held that these are agreements to divide territory and, as such, are *per se* violations of § 1 of the Sherman Act. The court made clear that it confined its order to transactions in which the distributor *purchases* from Schwinn. As to consignment, agency and Schwinn Plan transactions, the court held that, in these instances, "Schwinn has a right to allocate its agents or salesmen to a particular territory." The court also held that the franchising of retailers was reasonable in view of the competitive problem presented by "giant" bicycle retailers such as Sears and Ward and by other mass merchandisers, and it declined to enjoin appellees' practices with respect to confinement of sale by distributors or Schwinn to franchised retailers, or to forbid Schwinn and its distributors from continuing to prohibit franchised retailers

from selling to discount houses or other unfranchised retailers for resale to the public.

As noted above, appellees have not appealed from the District Court's order, and, accordingly, we have before us only the Government's pleas: (1) that the decree should not be confined to *sale* transactions between Schwinn and wholesalers but should reach territorial restrictions upon distributors whether they are incident to sale and resale transactions or to consignment, agency or Schwinn-Plan relationship between Schwinn and the distributors; (2) that agreements requiring distributors to limit their distribution to only such retailers as are franchised should be enjoined; and (3) that arrangements preventing franchised retailers from supplying non-franchised retailers, including discount stores, should also be forbidden.

As to point (2), the Government argues that it is illogical and inconsistent to forbid territorial limitations on resales by distributors where the distributor owns the goods, having bought them from Schwinn, and, at the same time, to exonerate arrangements which require distributors to confine resales of the goods they have bought to "franchised" retailers. It argues that requiring distributors, once they have purchased the product, to confine sales to franchised retailers is indistinguishable in law and principle from the division of territory which the decree condemns. Both, the Government argues, are in the nature of restraints upon alienation which are beyond the power of the manufacturer to impose upon its vendees and which, since the nature of the transaction includes an agreement, combination or understanding, are violations of § 1 of the Sherman Act. Cf. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373 (1911); *United States* v. *Bausch & Lomb Co.*, *supra*; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, *supra*; *Fash-*

ion Originators' Guild v. *FTC*, 312 U. S. 457 (1941); *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966). We agree, and upon remand, the decree should be revised to enjoin any limitation upon the freedom of distributors to dispose of the Schwinn products, which they have bought from Schwinn, where and to whomever they choose. The principle is, of course, equally applicable to sales to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products.

The appellant vigorously argues that, since this remedy is confined to situations where the distributor and retailer acquire title to the bicycles, it will provide only partial relief; that to prevent the allocation of territories and confinement to franchised retail dealers, the decree can and should be enlarged to forbid these practices, however effected—whether by sale and resale or by agency, consignment, or the Schwinn Plan. But we are dealing here with a vertical restraint embodying the unilateral program of a single manufacturer. We are not dealing with a combination of manufacturers, as in *Klor's*, or of distributors, as in *General Motors*. We are not dealing with a "division" of territory in the sense of an allocation by and among the distributors, see *Sealy*, *supra*, or an agreement among distributors to restrict their competition, see *General Motors*, *supra*. We are here concerned with a truly vertical arrangement, raising the fundamental question of the degree to which a manufacturer may not only select the customers to whom he will sell, but also allocate territories for resale and confine access to his product to selected, or franchised, retailers. We conclude that the proper application of § 1 of the Sherman Act to this problem requires differentiation between the situation where the manu-

facturer parts with title, dominion, or risk with respect to the article, and where he completely retains ownership and risk of loss.

As the District Court held, where a manufacturer *sells* products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results. And, as we have held, the same principle applies to restrictions of outlets with which the distributors may deal and to restraints upon retailers to whom the goods are sold. Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor, supra; Dr. Miles, supra.* Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.[6] To permit this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale. On the other hand, as indicated in *White Motor,* we are not prepared to introduce the inflexibility which a *per se* rule might bring if it were applied to prohibit all vertical restrictions of territory and all franchising, in the sense of designating specified distributors and retailers as the chosen instruments through which the manufacturer, re-

[6] We have no occasion here to consider whether a patentee has any greater rights in this respect. Compare *United States* v. *General Electric Co.,* 272 U. S. 476 (1926), with *United States* v. *New Wrinkle, Inc.,* 342 U. S. 371 (1952); *United States* v. *Line Material Co.,* 333 U. S. 287 (1948); and *United States* v. *Masonite Corp.,* 316 U. S. 265 (1942).

taining ownership of the goods, will distribute them to the public. Such a rule might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers, and it might sharply accelerate the trend towards vertical integration of the distribution process. But to allow this freedom where the manufacturer has parted with dominion over the goods—the usual marketing situation—would violate the ancient rule against restraints on alienation and open the door to exclusivity of outlets and limitation of territory further than prudence permits.

The Government does not here contend for a *per se* rule as to agency, consignment, or Schwinn-Plan transactions even though these may be used—as they are here—to implement a scheme of confining distribution outlets as in this case. Where the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is "unreasonably" restrictive of competition that a violation of § 1 results from such confinement, unencumbered by culpable price fixing. *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964). As the District Court found, Schwinn adopted the challenged distribution programs in a competitive situation dominated by mass merchandisers which command access to large-scale advertising and promotion, choice of retail outlets, both owned and franchised, and adequate sources of supply. It is not claimed that Schwinn's practices or other circumstances resulted in an inadequate competitive situation with respect to the bicycle market; and there is nothing in this record—after elimination of the price-fixing issue—to lead us to conclude that Schwinn's program exceeded the limits reasonably necessary to meet

the competitive problems posed by its more powerful competitors. In these circumstances, the rule of reason is satisfied.

We do not suggest that the unilateral adoption by a single manufacturer of an agency or consignment pattern and the Schwinn type of restrictive distribution system would be justified in any and all circumstances by the presence of the competition of mass merchandisers and by the demonstrated need of the franchise system to meet that competition. But certainly, in such circumstances, the vertically imposed distribution restraints—*absent* price fixing and in the presence of adequate sources of alternative products to meet the needs of the unfranchised—may not be held to be *per se* violations of the Sherman Act. The Government, in this Court, so concedes in this case.

On this record, we cannot brand the District Court's finding as clearly erroneous and cannot ourselves conclude that Schwinn's franchising of retailers and its confinement of retail sales to them—so long as it retains all indicia of ownership, including title, dominion, and risk, and so long as the dealers in question are indistinguishable in function from agents or salesmen—constitute an "unreasonable" restraint of trade. Critical in this respect are the facts: (1) that other competitive bicycles are available to distributors and retailers in the marketplace, and there is no showing that they are not in all respects reasonably interchangeable as articles of competitive commerce with the Schwinn product; [7] (2) that Schwinn distributors and retailers handle other brands of bicycles as well as Schwinn's; (3) in the present posture of the case we cannot rule that the vertical restraints are unreasonable because of their intermixture with price fixing; and (4) we cannot disagree with the findings of

[7] We do not regard Schwinn's claim of product excellence as establishing the contrary.

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the trial court that competition made necessary the challenged program; that it was justified by, and went no further than required by, competitive pressures; and that its net effect is to preserve and not to damage competition in the bicycle market. Application of the rule of reason here cannot be confined to intrabrand competition. When we look to the product market as a whole, we cannot conclude that Schwinn's franchise system with respect to products as to which it retains ownership and risk constitutes an unreasonable restraint of trade. This does not, of course, excuse or condone the *per se* violations which, in substance, consist of the control over the resale of Schwinn's products after Schwinn has parted with ownership thereof. Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.

Accordingly, the judgment of the District Court is reversed and the cause remanded for the entry of a decree in accordance with this opinion.

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE WHITE took no part in the decision of this case.

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN joins, concurring in part and dissenting in part.

I agree with the Court's basic determination that Schwinn's marketing system is, under the rule of reason, entirely consonant with the antitrust laws. But I cannot understand how that marketing system becomes *per se* unreasonable and illegal in those instances where it is effectuated through sales to wholesalers and dealers.

Schwinn's present marketing policies were developed in the late 1940's and early 1950's. Studies undertaken at that time revealed that Schwinn's existing distribution activities were haphazard and inefficient, involving a large number of wholesalers and over 15,000 retailers of every size and variety. Many of the retailers were largely or completely inactive, resulting in unprofitable overhead costs and wasted advertising and promotional expenditures for Schwinn. Moreover, the sales methods and service resources of many of these outlets did not comport with Schwinn's traditional policy of manufacturing and selling quality bicycles. Schwinn believed that proper promotion of its products required an active and stable dealer organization, composed of experienced people who could properly promote, assemble and service bicycles. Such dealers were to be found primarily in small independent bicycle sales and repair shops, rather than hardware stores or mass merchandisers that sold bicycles unassembled in the carton and provided no service and repair facilities.[1] As the District Court found, "Schwinn determined that it did not want Tom, Dick and Harry to be selling its product in a carton, collecting the price paid, 'kissing the customer goodbye,' depositing his profit and forgetting the customer, Schwinn, and the public generally." [2]

Schwinn accordingly developed a franchising policy that would assure quality and efficiency in its distribution system. After consulting with marketing experts in government and industry and clearing its program with the Federal Trade Commission, it franchised about 5,500

[1] The District Court found that: "Bicycles are in constant need of service. Hardware stores, department stores, and most other sales outlets do not furnish these services. Retail cycle outlets do. That is the type of business establishment that Schwinn has turned to as their local sales representatives." 237 F. Supp. 323, 335.

[2] 237 F. Supp., at 338.

selected retailers to market its products. "Schwinn chose those who by their record were best credit risks, made the most sales, and provided the best service for Schwinn bicycles." [3] These retailers were predominantly the small independent bicycle sales and repair dealers mentioned above, who now represent nearly all of Schwinn's outlets.

By forming this relationship with independent dealers, Schwinn hoped to meet the competition of the giant chain distributors. These distributors account for 60% of retail bicycle sales. Although the past decade and a half has been one of unprecedented vigorous competition in the industry, spurred by a flood of imported bicycles, Schwinn's policy has in large part succeeded. While profits and margins have been squeezed,[4] Schwinn's sales have increased substantially, it has pared the number of inactive retailers and increased the number of high-volume dealers, and it has reaped a greater return from its advertising and promotional expenditures. As the District Court concluded: [5]

> "The evidence is abundantly clear that Schwinn's practice of eliminating dead timber, useless and inactive or relatively inactive accounts, and persons and firms unable or unwilling to provide service and part replacements, and adopting and adhering to a franchise program instead of restraining trade in Schwinn bicycles, has greatly enhanced trade in Schwinn bicycles and has in fact been the salvation of Schwinn . . . and has actually made for genuine competition in the bicycle manufacturing industry."

Of course, the whole premise of Schwinn's marketing program was that its product would be sold to the public

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[3] *Ibid.*

[4] In the 1951–1961 period, Schwinn's prices fell between 9% and 12%, and its profits also declined. The margins of its wholesalers and retailers were reduced about 10% during the same period.

[5] 237 F. Supp., at 338.

only by the qualified retailers whom it had franchised.[6] Accordingly, Schwinn unilaterally instituted a policy of ensuring that only franchised retailers would be supplied with its products. This policy was the same, whether distribution took the form of the so-called Schwinn Plan deliveries to retailers, or agency and consignment arrangements, or whether it took the form of sales by Schwinn to wholesalers and resale by them to retailers. The record shows that this policy was implemented largely through request and persuasion by Schwinn.

Schwinn's selective distribution policy may be said to embody restraints on trade. As such, it is subject to antitrust scrutiny, but the scrutiny does not stop with the label "restraint." The words written by Mr. Justice Brandeis for a unanimous Court in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238, bear repeating:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

In *White Motor Co.* v. *United States*, 372 U. S. 253, we reaffirmed this formulation of the rule of reason and

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[6] This premise is common to all forms of franchising. See Lewis & Hancock, The Franchise System of Distribution 4, 9 (1963).

refused to adopt *per se* rules to invalidate vertical restraints on distribution analogous to but more restrictive than those involved here. The District Court in this case explicitly followed the directive of *White Motor* and examined in detail the historical and economic context in which Schwinn's distribution policies were developed and applied. The evidence fully supports the District Court's findings that the ultimate effect of these policies was to enhance rather than undermine or destroy competition, and I fully join the Court's approval of those findings today.

It is worth emphasizing that the justifications for Schwinn's franchising policy rest not only on the facts of this particular record, but on larger issues of social and economic policy. This Court has recognized Congress' concern with the disappearance of the small independent merchant in the face of competition from vertically integrated giants. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 333, 346. This trend in many cases reflects the inexorable economic realities of modern marketing. But franchising promises to provide the independent merchant with the means to become an efficient and effective competitor of large integrated firms. Through various forms of franchising, the manufacturer is assured qualified and effective outlets for his products, and the franchisee enjoys backing in the form of know-how and financial assistance.[7] These franchise arrangements also make significant social and economic contributions of importance to the whole society, as at least one federal court has noted:

> "The franchise method of operation has the advantage, from the standpoint of our American sys-

[7] See Lewis & Hancock, The Franchise System of Distribution (1963); Small Business Administration, Management Aids for Small Manufacturers, No. 182, "Expanding Sales Through Franchising" (1966).

> tem of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. . . . If our economy had not developed that system of operation these individuals would have turned out to have been merely employees. The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain." [8]

Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force "suppliers to abandon franchising and integrate forward to the detriment of small business. In other words, we may inadvertently compel concentration" by misguided zealousness.[9] As a result, "[t]here [would be] less and less place for the independent." *Standard Oil Co.* v. *United States*, 337 U. S. 293, 315 (separate opinion of MR. JUSTICE DOUGLAS). "The small, independent business man [would] be supplanted by clerks." *Id.*, at 321.

For these reasons I completely agree with the Court's basic approach to this case. The Court fully recognizes

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[8] *Susser* v. *Carvel Corp.*, 206 F. Supp. 636, 640, aff'd, 332 F. 2d 505, cert. granted, 379 U. S. 885, cert. dismissed, 381 U. S. 125. See also Distribution Problems Affecting Small Business, Hearings before the Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary, 89th Cong., 1st Sess., 7–9, 12–13 (statement of Small Business Administration Administrator Eugene P. Foley), 90 (statement of Federal Trade Commission Chairman Paul Rand Dixon) (March 1965); Lewis & Hancock, The Franchise System of Distribution 91–92 (1963); Handler, Statement Before the Small Business Administration, 11 Antitrust Bull. 417, 419.

[9] Wilson, Some Problems Relative to Franchise Arrangements, 11 Antitrust Bull. 473, 488. It should be noted that since the start of this litigation, Schwinn has taken over 30% of the wholesaling of its products by vertical integration.

that outlawry of franchising "might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers, and it might sharply accelerate the trend towards vertical integration of the distribution process." It acknowledges that Schwinn's marketing program has operated "to preserve and not to damage competition," and concludes that "the rule of reason" is satisfied. It upholds the legality of the Schwinn Plan, which is the heart of Schwinn's marketing system, now accounting for 75% of the distribution of Schwinn's products. It also upholds the legality of Schwinn's agency and consignment arrangements.

But the Court inexplicably turns its back on the values of competition by independent merchants and the flexible wisdom of the rule of reason when dealing with distribution effected through sales to wholesalers. In Schwinn's particular marketing system, this mode of distribution plays a subsidiary role, serving to meet "fill-in" orders by dealers, whose basic stock is obtained through the Schwinn Plan. Without considering its function, purpose or effect, the Court declares this aspect of Schwinn's program to be *per se* invalid. It likewise applies the same automatic rule of illegality to strike down Schwinn's policy of ensuring that franchised dealers do not resell to unfranchised retailers and thus subvert the whole distributional scheme.

Despite the Government's concession that the rule of reason applies to all aspects of Schwinn's distribution system, the Court nevertheless reaches out to adopt a potent *per se* rule. No previous antitrust decision of this Court justifies its action.[10] Instead, it completely

[10] The Court cites *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, but that case was decided on common-law principles and involved price-fixing, long recognized by this Court as *per se* invalid.

repudiates the only case in point, *White Motor*. There the manufacturer sold its products to retailers and wholesalers and imposed territorial and customer restrictions on their resale, restrictions much more stringent than those involved here. But the Court in *White Motor* refused to apply a *per se* rule to invalidate these restrictions, and declared that their legality must be tested under the rule of reason by examining their actual impact in a particular competitive context. The Court today is unable to give any reasons why, only four years later, this precedent should be overruled. Surely, we have not in this short interim accumulated sufficient new experience or insight to justify embracing a rule automatically invalidating any vertical restraints in a distribution system based on sales to wholesalers and retailers. See 372 U. S., at 264–266 (concurring opinion of MR. JUSTICE BRENNAN). Indeed, the Court does not cite or discuss any new data that might support such a radical change in the law. And I am completely at a loss to fathom how the Court can adopt its *per se* rule concerning distributional sales and yet uphold identical restrictions in Schwinn's marketing scheme when distribution takes the form of consignment or Schwinn Plan deliveries. It does not demonstrate that these restrictions are in their actual operation somehow more anticompetitive or less justifiable merely because the contractual relations between Schwinn and its jobbers and dealers bear the label "sale" rather than "agency" or "consignment." Such irrelevant formulae are false guides to sound adjudication in the antitrust field: "Our choice must be made on the basis not of abstractions but of the realities of modern industrial life." *Standard Oil Co.* v. *United States*, 337 U. S. 293, 320 (separate opinion of MR. JUSTICE DOUGLAS).

The Court advances two justifications for its new *per se* rule. I do not find either persuasive. First, the

Court correctly observes that the District Court invalidated territorial limitations on the resale activities of Schwinn's wholesalers. The Court then states that it would be "illogical and inconsistent" not to strike down all the other restrictions in Schwinn's marketing program insofar as sales are involved. But the Court completely overlooks the fact that the territorial limitations invalidated by the District Court were the product of a horizontal conspiracy between the wholesalers. The District Court found a "division of territory by agreement between the distributors . . . horizontal in nature."[11] Schwinn played a part in this conspiracy, but just as in *United States* v. *General Motors Corp.*, 384 U. S. 127, 140, that did not alter its fundamentally horizontal nature as a "classic conspiracy in restraint of trade." In striking down this horizontal division of markets between competing distributors, the District Court was simply following familiar precedent. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593. By contrast, the restrictions involved in the franchising methods now before us are quite different in nature, as the Court points out elsewhere in its opinion:

> "[W]e are dealing here with a vertical restraint embodying the unilateral program of a single manufacturer. We are not dealing with a combination . . . of distributors, as in *General Motors*. We are not dealing with a 'division' of territory in the sense of an allocation by and among the distributors . . . or an agreement among distributors to restrict their competition, see *General Motors, supra*. We are here concerned with a truly vertical arrangement." *Ante*, at 378.

As the Court also emphasizes, the legal principles applicable to horizontal and vertical restrictions are quite

[11] 237 F. Supp., at 342.

different.[12] Thus, applying the rule of reason to the vertical restraints now in issue is not at all "illogical and inconsistent" with *per se* invalidation of the wholesalers' horizontal division of markets.

The Court's second justification for its new *per se* doctrine is the "ancient rule against restraints on alienation." This rule of property law is certainly ancient—it traces its lineage to Coke on Littleton.[13] But it is hardly the practice of this Court to embrace a rule of law merely on grounds of its antiquity. Moreover, the common-law doctrine of restraints on alienation is not nearly so rigid as the Court implies. The original rule concerned itself with arbitrary and severe restrictions on alienation, such as total prohibition of resale.[14] As early as 1711 it was recognized that only *unreasonable* restraints should be proscribed, and that partial restrictions could be justified when ancillary to a legitimate business purpose and not

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[12] One difference between a horizontal conspiracy and vertical restraints imposed by the manufacturer is that there is often serious question whether the latter conduct involves the "contract, combination . . . or conspiracy" required by § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. The District Judge in this case refused to find that the relevant conduct of Schwinn and its distributors amounted to a "contract," "combination" or "conspiracy." Instead, he stated that "the Schwinn franchising program was conceived, hatched and born into life . . . in the minds of the Schwinn officials," and agreed that "the action was unilateral in nature." Although essential to its case, the Government failed specifically to raise this issue in its Jurisdictional Statement, and I must register my disagreement with the Court's cursory treatment of the matter. The Court merely notes that "Schwinn has been 'firm and resolute' in insisting upon observance" of the restrictions involved in its franchising program and that there was a "communicated danger of termination" for violations of its policies. This alone does not amount to a "contract," "combination" or "conspiracy" under established precedent. *United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *Parke, Davis & Co.*, 362 U. S. 29.

[13] 2 Coke, Institutes of the Laws of England § 360 (Day ed. 1812).

[14] *Ibid.*

unduly anticompetitive in effect. *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347. Cf. *Tulk* v. *Moxhay*, 2 Ph. 774, 41 Eng. Rep. 1143. This doctrine of ancillary restraints was assimilated into the jurisprudence of this country in the nineteenth century. See *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271.

Centuries ago, it could perhaps be assumed that a manufacturer had no legitimate interest in what happened to his products once he had sold them to a middleman and they had started their way down the channel of distribution. But this assumption no longer holds true in a day of sophisticated marketing policies, mass advertising, and vertically integrated manufacturer-distributors.[15] Restrictions like those involved in a franchising program should accordingly be able to claim justification under the ancillary restraints doctrine.

In any event, the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today. The problems involved are difficult and complex,[16] and our response should be more reasoned and sensitive than the simple acceptance of a hoary formula. "It does seem possible that the nineteenth and twentieth centuries have contributed legal conceptions growing out of new types of

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[15] See Elman, "Petrified Opinions" and Competitive Realities, 66 Col. L. Rev. 625.

[16] See Jordan, Exclusive and Restricted Sales Areas Under the Antitrust Laws, 9 U. C. L. A. L. Rev. 111; McLaren, Territorial Restrictions, Exclusive Dealing, and Related Sales Distribution Problems Under the Antitrust Laws, 11 Prac. Law. No. 4, 79; Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506; Robinson, Restraints on Trade and the Orderly Marketing of Goods, 45 Cornell L. Q. 254; Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795.

business which make it inappropriate" for the Court to base its "overthrow of contemporary commercial policies on judicial views of the reign of Queen Elizabeth." [17] Moreover, the Court's answer makes everything turn on whether the arrangement between a manufacturer and his distributor is denominated a "sale" or "agency." Such a rule ignores and conceals the "economic and business stuff out of which" a sound answer should be fashioned. *White Motor Co.* v. *United States, supra,* at 263. The Court has emphasized in the past that these differences in form often do not represent "differences in substance." *Simpson* v. *Union Oil Co.,* 377 U. S. 13, 22. Draftsmen may cast business arrangements in different legal molds for purposes of commercial law, but these arrangements may operate identically in terms of economic function and competitive effect. It is the latter factors which are the concern of the antitrust laws. The record does not show that the purposes of Schwinn's franchising program and the competitive consequences of its implementation differed, depending on whether Schwinn sold its products to wholesalers or resorted to the agency, consignment, or Schwinn Plan methods of distribution. And there is no reason generally to suppose that variations in the formal legal packaging of franchising programs produce differences in their actual impact in the marketplace. Our experience is to the contrary. As stated in *United States* v. *Masonite Corp.,* 316 U. S. 265, 278, 280:

> "[T]his Court has quite consistently refused to allow the form into which the parties chose to cast the transaction to govern.
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> . . . . . .
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> "So far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has

[17] Chafee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945, 983.

manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade."

The impact of today's decision on Schwinn may be slight, because over 75% of its distribution is done through the Schwinn Plan, which the Court upholds. Perhaps Schwinn can rearrange the legal terminology of its other distributional arrangements to avoid "the ancient rule against restraints on alienation" which the Court adopts. Perhaps other manufacturers who use sales as a means of distribution in a franchise or analogous marketing system can do likewise. If they can, the Court has created considerable business for legal draftsmen. If they cannot, vertical integration and the elimination of small independent competitors are likely to follow. Meanwhile, the Court has, *sua sponte*, created a bluntly indiscriminate and destructive weapon which can be used to dismantle a vast variety of distributional systems—competitive and anticompetitive, reasonable and unreasonable.

In view of the commendably careful and realistic approach the Court has taken in analyzing the basic structure of Schwinn's marketing program, it is particularly disappointing to see the Court balk at the label "sale," and turn from reasoned response to a wooden and irrelevant formula.

Syllabus.

PRIMA PAINT CORP. *v.* FLOOD & CONKLIN MFG. CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 343. Argued March 16, 1967.—Decided June 12, 1967.

Respondent (F & C), a New Jersey corporation which manufactured and sold paint and paint products to wholesale customers in a number of States, entered into a contract with petitioner (Prima), a Maryland corporation, whereby F & C agreed to perform consulting and other services relating to the transfer of operations from F & C to Prima and agreed not to compete with Prima, for which Prima agreed to pay, over the six-year life of the contract, certain percentages of receipts from sales. The contract, which stated that it "embodies the entire understanding of the parties," contained a broad arbitration clause that "[a]ny controversy . . . arising out of this agreement, or the breach thereof, shall be settled by arbitration in the City of New York in accordance with the rules . . . of the American Arbitration Association." Almost a year later, after the first payment had become due, Prima notified F & C that F & C had broken the consulting agreement and an earlier agreement involving Prima's purchase of F & C's paint business. Prima's chief contention was that F & C had fraudulently represented that it was solvent and able to perform its obligations whereas it was insolvent and planned to file a bankruptcy petition shortly after executing the consulting agreement. F & C responded by serving a notice of intention to arbitrate, whereupon Prima filed this diversity action in federal court for rescission of the consulting agreement on the basis of the alleged fraudulent inducement and contemporaneously sought to enjoin F & C from proceeding with arbitration. The United States Arbitration Act of 1925 provides, in § 2, that a written arbitration provision "in any . . . contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"; in § 3, that a federal court in which suit is brought upon an issue referable to arbitration by an arbitration agreement must stay the court action pending arbitration once it has decided that the issue is arbitrable under the agreement; and, in § 4, that a federal court whose assistance is invoked by a party seeking to compel

another to arbitrate, if satisfied that an arbitration agreement has not been honored and that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue," shall order arbitration. The District Court granted a motion filed by F & C to stay the action pending arbitration, and the Court of Appeals dismissed Prima's appeal. *Held:*

1. The contract clearly evidenced a transaction involving interstate commerce and came within the coverage of the Arbitration Act. P. 401.

2. In passing upon an application for a stay of arbitration under § 3 of the Act, a federal court may not consider a claim of fraud in the inducement of the contract generally but "may consider only the issues relating to the making and performance of the agreement to arbitrate." Pp. 402–404.

3. The Act prescribes the manner in which federal courts are to treat questions relating to arbitration clauses in contracts which involve interstate commerce or admiralty, "subject matter over which Congress plainly has power to legislate." Hence, state rules allocating functions between court and arbitrator do not control. Pp. 404–405.

4. Since the claim of fraud here relates to inducement of the consulting agreement generally rather than in the arbitration clause and there is no evidence that the parties intended to withhold this issue from arbitration, there is no basis for granting a stay under § 3. Pp. 406–407.

360 F. 2d 315, affirmed.

Robert P. Herzog argued the cause and filed briefs for petitioner.

Martin A. Coleman argued the cause for respondent. With him on the brief was *David N. Brainin.*

Gerald Aksen argued the cause for the American Arbitration Association, as *amicus curiae.* With him on the brief were *Whitney North Seymour, Sol N. Corbin, Osmond K. Fraenkel, William J. Isaacson* and *H. H. Nordlinger.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case presents the question whether the federal court or an arbitrator is to resolve a claim of "fraud in

the inducement," under a contract governed by the United States Arbitration Act of 1925,[1] where there is no evidence that the contracting parties intended to withhold that issue from arbitration.

The question arises from the following set of facts. On October 7, 1964, respondent, Flood & Conklin Manufacturing Company, a New Jersey corporation, entered into what was styled a "Consulting Agreement," with petitioner, Prima Paint Corporation, a Maryland corporation. This agreement followed by less than three weeks the execution of a contract pursuant to which Prima Paint purchased F & C's paint business. The consulting agreement provided that for a six-year period F & C was to furnish advice and consultation "in connection with the formulae, manufacturing operations, sales and servicing of Prima Trade Sales accounts." These services were to be performed personally by F & C's chairman, Jerome K. Jelin, "except in the event of his death or disability." F & C bound itself for the duration of the contractual period to make no "Trade Sales" of paint or paint products in its existing sales territory or to current customers. To the consulting agreement were appended lists of F & C customers, whose patronage was to be taken over by Prima Paint. In return for these lists, the covenant not to compete, and the services of Mr. Jelin, Prima Paint agreed to pay F & C certain percentages of its receipts from the listed customers and from all others, such payments not to exceed $225,000 over the life of the agreement. The agreement took into account the possibility that Prima Paint might encounter financial difficulties, including bankruptcy, but no corresponding reference was made to possible financial problems which might be encountered by F & C. The agreement stated that it "embodies the entire understanding of the parties

[1] 9 U. S. C. §§ 1–14.

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on the subject matter." Finally, the parties agreed to a broad arbitration clause, which read in part:

> "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association . . . ."

The first payment by Prima Paint to F & C under the consulting agreement was due on September 1, 1965. None was made on that date. Seventeen days later, Prima Paint did pay the appropriate amount, but into escrow. It notified attorneys for F & C that in various enumerated respects their client had broken both the consulting agreement and the earlier purchase agreement. Prima Paint's principal contention, so far as presently relevant, was that F & C had fraudulently represented that it was solvent and able to perform its contractual obligations, whereas it was in fact insolvent and intended to file a petition under Chapter XI of the Bankruptcy Act, 52 Stat. 905, 11 U. S. C. § 701 *et seq.*, shortly after execution of the consulting agreement. Prima Paint noted that such a petition was filed by F & C on October 14, 1964, one week after the contract had been signed. F & C's response, on October 25, was to serve a "notice of intention to arbitrate." On November 12, three days before expiration of its time to answer this "notice," Prima Paint filed suit in the United States District Court for the Southern District of New York, seeking rescission of the consulting agreement on the basis of the alleged fraudulent inducement.[2] The complaint asserted that the federal court had diversity jurisdiction.

[2] Although the letter to F & C's attorneys had alleged breaches of both consulting and purchasing agreements, and the fraudulent inducement of both, the complaint did not refer to the earlier purchase agreement, alleging only that Prima Paint had been "fraudulently

Contemporaneously with the filing of its complaint, Prima Paint petitioned the District Court for an order enjoining F & C from proceeding with the arbitration. F & C cross-moved to stay the court action pending arbitration. F & C contended that the issue presented—whether there was fraud in the inducement of the consulting agreement—was a question for the arbitrators and not for the District Court. Cross-affidavits were filed on the merits. On behalf of Prima Paint, the charges in the complaint were reiterated. Affiants for F & C attacked the sufficiency of Prima Paint's allegations of fraud, denied that misrepresentations had been made during negotiations, and asserted that Prima Paint had relied exclusively upon delivery of the lists, the promise not to compete, and the availability of Mr. Jelin. They contended that Prima Paint had availed itself of these considerations for nearly a year without claiming "fraud," noting that Prima Paint was in no position to claim ignorance of the bankruptcy proceeding since it had participated therein in February of 1965. They added that F & C was revested with its assets in March of 1965.

The District Court granted F & C's motion to stay the action pending arbitration, holding that a charge of fraud in the inducement of a contract containing an arbitration clause as broad as this one was a question for the arbitrators and not for the court. For this proposition it relied on *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (C. A. 2d Cir. 1959), cert. granted, 362 U. S. 909, dismissed under Rule 60, 364 U. S. 801 (1960). The Court of Appeals for the Second Circuit dismissed Prima Paint's appeal. It held that the contract in question evidenced a transaction involving interstate commerce; that under the controlling *Robert*

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induced to accelerate the execution and closing date of the [consulting] agreement herein, from October 21, 1964 to October 7, 1964. . . ."

Lawrence Co. decision a claim of fraud in the inducement of the contract generally—as opposed to the arbitration clause itself—is for the arbitrators and not for the courts; and that this rule—one of "national substantive law"—governs even in the face of a contrary state rule.[3] We agree, albeit for somewhat different reasons, and we affirm the decision below.

The key statutory provisions are §§ 2, 3, and 4 of the United States Arbitration Act of 1925. Section 2 provides that a written provision for arbitration "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [4] Section 3 requires a federal court in which suit has been brought "upon any issue referable to arbitration under an agreement in writing for such arbitration" to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement. Section 4 provides a federal remedy for a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration," and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored.[5]

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[3] Whether a party seeking *rescission* of a contract on the ground of fraudulent inducement may in New York obtain judicial resolution of his claim is not entirely clear. Compare *Exercycle Corp.* v. *Maratta*, 9 N. Y. 2d 329, 334, 174 N. E. 2d 463, 465 (1961), and *Amerotron Corp.* v. *Maxwell Shapiro Woolen Co.*, 3 App. Div. 2d 899, 162 N. Y. S. 2d 214 (1957), aff'd, 4 N. Y. 2d 722, 148 N. E. 2d 319 (1958), with *Fabrex Corp.* v. *Winard Sales Co.*, 23 Misc. 2d 26, 200 N. Y. S. 2d 278 (1960). In light of our disposition of this case, we need not decide the status of the issue under New York law.

[4] The meaning of "maritime transaction" and "commerce" is set forth in § 1 of the Act.

[5] See, *infra*, at 403–404.

In *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956), this Court held that the stay provisions of § 3, invoked here by respondent F & C, apply only to the two kinds of contracts specified in §§ 1 and 2 of the Act, namely those in admiralty or evidencing transactions in "commerce." Our first question, then, is whether the consulting agreement between F & C and Prima Paint is such a contract. We agree with the Court of Appeals that it is. Prima Paint acquired a New Jersey paint business serving at least 175 wholesale clients in a number of States, and secured F & C's assistance in arranging the transfer of manufacturing and selling operations from New Jersey to Maryland.[6] The consulting agreement was inextricably tied to this interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business. There could not be a clearer case of a contract evidencing a transaction in interstate commerce.[7]

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[6] This conclusion is amply supported by an affidavit submitted to the District Court by Prima Paint's own president, which read in part:

"The agreement entered into between the parties on October 7, 1964, contemplated and intended an orderly transfer of the assets of the defendant to the plaintiff, and further contemplated and intended that the defendant would consult, advise, assist and help the plaintiff so as to insure a smooth transition of manufacturing operations to Maryland from New Jersey, together with the sales and servicing of customer accounts and the retention of the said customers."

The affidavit's references to a "transfer of the assets" cannot fairly be read to mean only "expertise and know-how . . . and a covenant not to compete," as argued by counsel for petitioner.

[7] It is suggested in dissent that, despite the absence of any language in the statute so indicating, we should construe it to apply only to "contracts between merchants for the interstate shipment of goods." Not only have we neither the desire nor the warrant so to amend the statute, but we find persuasive and authoritative evidence of a contrary legislative intent. See, *e. g.*, the House Report on this legislation which proclaims that "[t]he control over interstate commerce [one of the bases for the legislation] reaches not only the

Having determined that the contract in question is within the coverage of the Arbitration Act, we turn to the central issue in this case: whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators. The courts of appeals have differed in their approach to this question. The view of the Court of Appeals for the Second Circuit, as expressed in this case and in others,[8] is that—*except where the parties otherwise intend*—arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.[9] The Court of Appeals for the First

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actual physical interstate shipment of goods but also contracts relating to interstate commerce." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). We note, too, that were the dissent's curious narrowing of the statute correct, there would have been no necessity for Congress to have amended the statute to exclude certain kinds of employment contracts. See § 1. In any event, the anomaly urged upon us in dissent is manifested by the present case. It would be remarkable to say that a contract for the purchase of a single can of paint may evidence a transaction in interstate commerce, but that an agreement relating to the facilitation of the purchase of an entire interstate paint business and its re-establishment and operation in another State is not.

[8] In addition to *Robert Lawrence Co., supra*, see *In re Kinoshita & Co.*, 287 F. 2d 951 (C. A. 2d Cir. 1961). With respect to claims other than fraud in the inducement, the court has followed a similar process of analysis. See, *e. g., Metro Industrial Painting Corp.* v. *Terminal Constr. Co.*, 287 F. 2d 382 (C. A. 2d Cir. 1961) (dispute over performance); *El Hoss Engineer. & Transport Co.* v. *American Ind. Oil Co.*, 289 F. 2d 346 (C. A. 2d Cir. 1961) (where, however, the court found an intent not to submit the issue in question to arbitration).

[9] The Court of Appeals has been careful to honor evidence that the parties intended to withhold such issues from the arbitrators

Circuit, on the other hand, has taken the view that the question of "severability" is one of state law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court. *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 280 F. 2d 915, 923–924 (C. A. 1st Cir.), cert. denied, 364 U. S. 911 (1960).[10]

With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in "commerce," we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. Under §4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue."[11] Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which

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and to reserve them for judicial resolution. See *El Hoss Engineer. & Transport Co.* v. *American Ind. Oil Co., supra.* We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1.

[10] These cases and others are discussed in a recent Note, Commercial Arbitration in Federal Courts, 20 Vand. L. Rev. 607, 622–625 (1967).

[11] Section 4 reads in part: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it.[12] But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

There remains the question whether such a rule is constitutionally permissible. The point is made that, whatever the nature of the contract involved here, this case is in federal court solely by reason of diversity of citizenship, and that since the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), federal courts are bound in diversity cases to follow state rules of decision in matters which are "substantive" rather than "proce-

[12] This position is consistent both with the decision in *Moseley* v. *Electronic Facilities*, 374 U. S. 167, 171, 172 (1963), and with the statutory scheme. As the "saving clause" in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the "saving clause."

dural," or where the matter is "outcome determinative." *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945). The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. See *Bernhardt* v. *Polygraphic Co., supra,* at 202, and concurring opinion, at 208. Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of "control over interstate commerce and over admiralty." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924).[13]

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[13] It is true that the Arbitration Act was passed 13 years before this Court's decision in *Erie R. Co.* v. *Tompkins, supra,* brought to an end the regime of *Swift* v. *Tyson,* 16 Pet. 1 (1842), and that at the time of enactment Congress had reason to believe that it still had power to create federal rules to govern questions of "general law" arising in simple diversity cases—at least, absent any state statute to the contrary. If Congress relied at all on this "oft-challenged" power, see *Erie R. Co.,* 304 U. S., at 69, it was only supplementary to the admiralty and commerce powers, which formed the principal bases of the legislation. Indeed, Congressman Graham, the bill's sponsor in the House, told his colleagues that it "only affects contracts relating to interstate subjects and contracts in admiralty." 65 Cong. Rec. 1931 (1924). The Senate Report on this legislation similarly indicated that the bill "[relates] to maritime transactions and to contracts in interstate and foreign commerce." S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924).

Non-congressional sponsors of the legislation agreed. As Mr. Charles L. Bernheimer, chairman of the Arbitration Committee of the New York Chamber of Commerce, told the Senate subcommittee, the proposed legislation "follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction.

In the present case no claim has been advanced by Prima Paint that F & C fraudulently induced it to enter into the agreement to arbitrate "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof." This contractual language is easily broad enough to encompass Prima Paint's claim that both execution and acceleration of the consulting agreement itself were procured by fraud. Indeed, no claim is made that Prima Paint ever intended that "legal" issues relating to the contract be excluded from arbitration, or that it was not entirely free so to contract. Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power. The question which Prima Paint requested the District Court to adjudicate preliminarily to allowing arbitration to proceed is one

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These fields are in admiralty and in foreign and interstate commerce." Hearing on S. 4213 and S. 4214, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923). In the joint House and Senate hearings, Mr. Bernheimer answered "Yes; entirely," to the statement of the chairman, Senator Sterling, that "What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce." Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7 (1924). Mr. Julius Henry Cohen, draftsman for the American Bar Association of the proposed bill, said the sponsor's goals were: "[F]irst . . . to get a State statute, *and then to get a Federal law to cover interstate and foreign commerce and admiralty,* and, third, to get a treaty with foreign countries." Joint Hearings, *supra,* at 16 (emphasis added). See also Joint Hearings, *supra,* at 27–28 (statement of Mr. Alexander Rose). Mr. Cohen did submit a brief to the Subcommittee urging a jurisdictional base broader than the commerce and admiralty powers, Joint Hearings, *supra,* at 37–38, but there is no indication in the statute or in the legislative history that this invitation to go beyond those powers was accepted, and his own testimony took a much narrower tack.

not intended by Congress to delay the granting of a § 3 stay. Accordingly, the decision below dismissing Prima Paint's appeal is

Affirmed.

MR. JUSTICE HARLAN: In joining the Court's opinion I desire to note that I would also affirm the judgment below on the basis of *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (C. A. 2d Cir. 1959), cert. granted, 362 U. S. 909, dismissed under Rule 60, 364 U. S. 801 (1960).

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, dissenting.

The Court here holds that the United States Arbitration Act, 9 U. S. C. §§ 1–14, as a matter of federal substantive law, compels a party to a contract containing a written arbitration provision to carry out his "arbitration agreement" even though a court might, after a fair trial, hold the entire contract—including the arbitration agreement—void because of fraud in the inducement. The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so. I am by no means sure that thus forcing a person to forgo his opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process of law. I am satisfied, however, that Congress did not impose any such procedures in the Arbitration Act. And I am fully satisfied that a

reasonable and fair reading of that Act's language and history shows that both Congress and the framers of the Act were at great pains to emphasize that nonlawyers designated to adjust and arbitrate factual controversies arising out of valid contracts would not trespass upon the courts' prerogative to decide the legal question of whether any legal contract exists upon which to base an arbitration.

I.

The agreement involved here is a consulting agreement in which Flood & Conklin agreed to perform certain services for and not to compete with Prima Paint. The agreement contained an arbitration clause providing that "[a]ny controversy or claim arising out of or relating to this Agreement . . . shall be settled by arbitration in the City of New York." F & C, contending that Prima had failed to make a payment under the contract, sent Prima a "Notice of Intention to Arbitrate" pursuant to the New York Arbitration Act.[1] Invoking diversity jurisdiction, Prima brought this action in federal district court to rescind the entire consulting agreement on the ground of fraud. The fraud allegedly consisted of F & C's misrepresentation at the time the contract was made, that it was solvent and able to perform the agreement, while in fact it was completely insolvent. Prima alleged that it would not have made any contract at all with F & C but for this misrepresentation. Prima simply contended that there was never a meeting of minds between the parties. F & C moved to stay Prima's lawsuit for rescission pending arbitration of the fraud issue raised by Prima. The lower courts, relying on the

[1] N. Y. Civ. Prac. § 7503 (1963) provides that once a party is served with a notice of intention to arbitrate, "unless the party served applies to stay the arbitration within ten days after such service he shall thereafter be precluded from objecting that a valid agreement was not made . . . ."

Second Circuit's decision in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402, cert. granted, 362 U. S. 909, dismissed, 364 U. S. 801, held that, as a matter of "national substantive law," the arbitration clause in the contract is "separable" from the rest of the contract and that allegations that go to the validity of the contract in general, as opposed to the arbitration clause in particular, are to be decided by the arbitrator, not the court.

The Court today affirms this holding for three reasons, none of which is supported by the language or history of the Arbitration Act. First, the Court holds that because the consulting agreement was intended to supplement a separate contract for the interstate transfer of assets, it is itself a "contract evidencing a transaction involving commerce," the language used by Congress to describe contracts the Act was designed to cover. But in light of the legislative history which indicates that the Act was to have a limited application to contracts between merchants for the interstate shipment of goods,[2] and in light of the express failure of Congress to use language

[2] The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers. 50 A. B. A. Rep. 357 (1925). Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different States who produced, shipped, bought, or sold commodities. Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 3, 7, 9, 10 (1923). The same views were expressed in the 1924 hearings. When Senator Sterling suggested, "What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce," Mr. Bernheimer, a chief exponent of the bill, replied: "Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance." Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7. See also *id.*, at 27.

making the Act applicable to all contracts which "affect commerce," the statutory language Congress normally uses when it wishes to exercise its full powers over commerce,[3] I am not at all certain that the Act was intended to apply to this consulting agreement. Second, the Court holds that the language of § 4 of the Act provides an "explicit answer" to the question of whether the arbitration clause is "separable" from the rest of the contract in which it is contained. Section 4 merely provides that the court must order arbitration if it is "satisfied that the making of the agreement for arbitration . . . is not in issue." That language, considered alone, far from providing an "explicit answer," merely poses the further question of what kind of allegations put the making of the arbitration agreement in issue. Since both the lower courts assumed that but for the federal Act, New York law might apply and that under New York law a general allegation of fraud in the inducement puts into issue the making of the agreement to arbitrate (considered insep-

[3] In some Acts Congress uses broad language and defines commerce to include even that which "affects" commerce. Federal Employers' Liability Act, 35 Stat. 65, § 1, as amended, 45 U. S. C. § 51; National Labor Relations Act, 49 Stat. 450, § 2, as amended, 29 U. S. C. § 152 (7). In other instances Congress has chosen more restrictive language. Fair Labor Standards Act of 1938, 52 Stat. 1062, § 6, as amended, 29 U. S. C. § 206. Prior to this case, this Court has always made careful inquiry to assure itself that it is applying a statute with the coverage that Congress intended, so that the meaning *in that statute* of "commerce" will be neither expanded nor contracted. The Arbitration Act is an example of carefully limited language. It covers only those contracts "involving commerce," and nowhere is there a suggestion that it is meant to extend to contracts "affecting commerce." The Act not only uses narrow language, but also is completely without any declaration of some national interest to be served or some nationwide comprehensive scheme of regulation to be created, and this absence suggests that Congress did not intend to exert its full power over commerce.

arable under New York law from the rest of the contract),[4] the Court necessarily holds that federal law determines whether certain allegations put the making of the arbitration agreement in issue. And the Court approves the Second Circuit's fashioning of a federal separability rule which overrides state law to the contrary. The Court thus holds that the Arbitration Act, designed to provide merely a procedural remedy which would not interfere with state substantive law, authorizes federal courts to fashion a federal rule to make arbitration clauses "separable" and valid. And the Court approves a rule which is not only contrary to state law, but contrary to the intention of the parties and to accepted principles of contract law—a rule which indeed elevates arbitration provisions above all other contractual provisions. As the Court recognizes, that result was clearly not intended by Congress. Finally, the Court summarily disposes of the problem raised by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, recognized as a serious constitutional problem in *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, by insufficiently supported assertions that it is "clear beyond dispute" that Congress based the Arbitration Act on its power to regulate commerce and that "[i]f Congress relied at all on" its power to create federal law for diversity cases, such reliance "was only supplementary."

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[4] Although F & C requested arbitration pursuant to New York law, n. 1, *supra*, it is not entirely clear that New York law would apply in absence of the federal Act. And, as the Court points out, it is not entirely clear whether New York courts would consider Prima's promise to arbitrate inseparable from the rest of the contract. But, since *Robert Lawrence* held and the lower courts here assumed that application of New York law would produce a different result, and since the Court deems the status of state law immaterial to this case, I have assumed throughout this opinion that, in the absence of the Arbitration Act, Prima would have been able to obtain *judicial* resolution of its fraud allegations under New York law.

II.

Let us look briefly at the language of the Arbitration Act itself as Congress passed it. Section 2, the key provision of the Act, provides that "[a] written provision in . . . a contract . . . involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (Emphasis added.) Section 3 provides that "[i]f any suit . . . be brought . . . *upon any issue referable to arbitration* under an agreement in writing for such arbitration, the court . . . *upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement,* shall . . . stay the trial of the action until such arbitration has been had . . . ."[5] (Emphasis added.) The language of these sections could not, I think, raise doubts about their meaning except to someone anxious to find doubts. They simply mean this: an arbitration agreement is to be enforced by a federal court unless the court, not the arbitrator, finds grounds "at law or in equity for the revocation of any contract." Fraud, of course, is one of the most common grounds for revoking a contract. If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated. Sections 2 and 3 of the Act assume the existence of a valid contract. They merely provide for enforcement where such a valid contract

[5] This section, unlike § 4, is expressly applicable to situations like the present one where a defendant in a case already pending in federal court moves for a stay of the lawsuit. In finding an "explicit answer" in a provision "not expressly" applicable, the Court almost completely ignores the language of § 3 and the proviso to § 2, a section which *Bernhardt* held to "define the field in which Congress was legislating." 350 U. S., at 201.

exists. These provisions were plainly designed to protect a person against whom arbitration is sought to be enforced from having to submit his legal issues as to validity of the contract to the arbitrator. The legislative history of the Act makes this clear. Senator Walsh of Montana, in hearings on the bill in 1923, observed, "The court has got to hear and determine whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law . . . ." [6] Mr. Piatt, who represented the American Bar Association which drafted and supported the Act, was even more explicit: "I think this will operate something like an injunction process, except where he would attack it on the ground of fraud." [7] And then Senator Walsh replied: "If he should attack it on the ground of fraud, *to rescind the whole thing*. . . . I presume that it merely [is] a question of whether he did make the arbitration agreement or not, . . . and then he would possibly set up that he was misled about the contract and entered into it by mistake . . . ." [8] It is evident that Senator Walsh was referring to situations in which the validity of the entire contract is called into question. And Mr. Bernheimer, who represented one of the chambers of commerce in favor of the bill, assured the Senate subcommittee that "[t]he constitutional right to jury trial is adequately safeguarded" by the Act.[9] Mr. Cohen, the American Bar Association's draftsman of the bill, assured the members of Congress that the Act would not impair the right to a jury trial, because it deprives a person of that right only when he has voluntarily and validly waived it by agreeing to submit cer-

[6] Senate Hearing, *supra*, at 5.

[7] *Ibid.*

[8] *Ibid.*

[9] Senate Hearing, *supra*, at 2.

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tain disputes to arbitration.[10] The court and a jury are to determine both the legal existence and scope of such an agreement. The members of Congress revealed an acute awareness of this problem. On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees.[11] He noted that such contracts "are really not voluntarily [*sic*] things at all" because "there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court . . . ." [12] He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases. The significant thing is that Senator Walsh was not thinking in terms of the arbitration provisions being "separable" parts of such contracts, parts which should be enforced without regard to why the entire contracts in which they were contained were agreed to. The issue for him was not whether an arbitration provision in a contract was made, but why, in the context of the entire contract and the circum-

[10] "The one constitutional provision we have got is that you have a right of trial by jury. But you can waive that. And you can do that in advance. Ah, but the question whether you waive it or not depends on whether that is your signature to the paper, or whether you authorized that signature, or whether the paper is a valid paper or not, whether it was delivered properly. So there is a question there which you have not waived the right of trial by jury on." Joint Hearings, *supra*, at 17.

It seems quite clear to me that Mr. Cohen was referring to a jury trial of allegations challenging the validity of the *entire* contract.

[11] Senate Hearing, *supra*, at 9–11. See also Joint Hearings, *supra*, at 15.

[12] Senate Hearing, *supra*, at 9.

stances of the parties, the entire contract was made. That is precisely the issue that a general allegation of fraud in the inducement raises: Prima contended that it would not have executed any contract, including the arbitration clause, if it were not for the fraudulent representations of F & C. Prima's agreement to an arbitration clause in a contract obtained by fraud was no more "voluntary" than an insured's or employee's agreement to an arbitration clause in a contract obtained by superior bargaining power.

Finally, it is clear to me from the bill's sponsors' understanding of the function of arbitration that they never intended that the issue of fraud in the inducement be resolved by arbitration. They recognized two special values of arbitration: (1) the expertise of an arbitrator to decide factual questions in regard to the day-to-day performance of contractual obligations,[13] and (2) the speed with which arbitration, as contrasted to litigation, could resolve disputes over performance of contracts and thus mitigate the damages and allow the parties to continue performance under the contracts.[14] Arbitration serves neither of these functions where a contract is sought to be rescinded on the ground of fraud. On the one hand, courts have far more expertise in resolving legal issues which go to the validity of a contract than

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[13] "Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 281 (1926).

[14] See, *e. g.*, Senate Hearing, *supra*, at 3.

do arbitrators.[15] On the other hand, where a party seeks to rescind a contract and his allegation of fraud in the inducement is true, an arbitrator's speedy remedy of this wrong should never result in resumption of performance under the contract. And if the contract were not procured by fraud, the court, under the summary trial procedures provided by the Act, may determine with little delay that arbitration must proceed. The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation. *Tumey* v. *Ohio*, 273 U. S. 510.

III.

With such statutory language and legislative history, one can well wonder what is the basis for the Court's surprising departure from the Act's clear statement which expressly excepts from arbitration "such grounds as exist at law or in equity for the revocation of any contract." Credit for the creation of a rationalization to justify this statutory mutilation apparently must go to the Second Circuit's opinion in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., supra.* In that decision Judge Medina undertook to resolve the serious constitutional problem which this Court had avoided in *Bernhardt* by holding the Act inapplicable to a diversity case involving an intrastate contract. That problem was whether the Arbitra-

[15] "It [arbitration] is not a proper remedy for . . . questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law." Cohen & Dayton, *supra,* at 281.

tion Act, passed 13 years prior to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, could be constitutionally applied in a diversity case even though its application would require the federal court to enforce an agreement to arbitrate which the state court across the street would not enforce. *Bernhardt*'s holding that arbitration is "outcome determinative," 350 U. S., at 203, and its recognition that there would be unconstitutional discrimination if an arbitration agreement were enforceable in federal court but not in the state court, *id.*, at 204, posed a choice of two alternatives for Judge Medina. If he held that the Arbitration Act rested solely on Congress' power, widely recognized in 1925 but negated in *Erie*, to prescribe general federal law applicable in diversity cases, he would be compelled to hold the Act unconstitutional as applied to diversity cases under *Erie* and *Bernhardt*.[16] If he held that the Act rested on Congress' power to enact substantive law governing interstate commerce, then the *Erie-Bernhardt* problem would be avoided and the application of the Act to diversity cases involving commerce could be saved.

The difficulty in choosing between these two alternatives was that neither, quite contrary to the Court's position, was "clear beyond dispute" upon reference to the Act's legislative history.[17] As to the first, it is clear that Congress intended the Act to be applicable in diversity cases involving interstate commerce and maritime

[16] Mr. Justice Frankfurter chose this alternative in his concurring opinion in *Bernhardt*, 350 U. S., at 208, and even the Court there suggested that its pre-*Erie* decision in *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, which applied the Act to an interstate contract in a diversity case, might be decided differently under the *Bernhardt* holding that arbitration is outcome-determinative, 350 U. S., at 202.

[17] For an analysis of these alternatives, see generally, Symposium, Arbitration and the Courts, 58 Nw. U. L. Rev. 466 (1963); Note, 69 Yale L. J. 847 (1960).

contracts,[18] and to hold the Act inapplicable in diversity cases would be severely to limit its impact. As to the second alternative, it is clear that Congress in passing the Act relied primarily on its power to create general federal rules to govern federal courts. Over and over again the drafters of the Act assured Congress: "The statute establishes a procedure in the Federal courts .... It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power." [19] And again: "The primary purpose of the statute is to make enforcible in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe

[18] The House Report accompanying the Act expressly stated: "The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce . . . *or which may be the subject of litigation in the Federal courts.*" H. R. Rep. No. 96, 68th Cong., 1st sess., 1 (1924) (emphasis added). Mr. Cohen and a colleague, commenting on the Act after its passage, explained: "The Federal courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would have had jurisdiction .... Where the basis of jurisdiction is diversity of citizenship, the dispute must involve $3000 as in suits at law." Cohen & Dayton, *supra*, at 267. See, *e. g.*, Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153, 156; Note, 20 Ill. L. Rev. 111 (1925). The bill, as originally drafted by the American Bar Association, 49 A. B. A. Rep. 51–52 (1924), and introduced in the House, H. R. No. 646, 68th Cong., 1st Sess. (1924), 65 Cong. Rec. 11081–11082 (1924), expressly provided in § 8 "[t]hat if the basis of jurisdiction be diversity of citizenship . . . the district court . . . shall have jurisdiction . . . hereunder notwithstanding the amount in controversy is unascertained . . . ." Though that provision was deleted by the Senate, the omission was not intended substantially to alter the law. 66 Cong. Rec. 3004 (1925).

[19] Committee on Commerce, Trade & Commercial Law, *supra*, 11 A. B. A. J., at 154.

the jurisdiction and duties of the Federal courts." [20] One cannot read the legislative history without concluding that this power, and not Congress' power to legislate in the area of commerce, was the "principal basis" of the Act.[21] Also opposed to the view that Congress intended to create substantive law to govern commerce and maritime transactions are the frequent statements in the legislative history that the Act was not intended to be "the source of . . . substantive law." [22] As Congressman Graham explained the Act to the House:

> "It does not involve any new principle of law except to provide a simple method . . . in order to give enforcement . . . . *It creates no new legislation, grants no new rights, except a remedy* to enforce an agreement in commercial contracts and in

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[20] Joint Hearings, *supra*, at 38.

[21] Although Mr. Cohen, in a brief filed with Congress, suggested that Congress might rely on its power over commerce, he added that there were "questions which apparently can be raised in this connection," *id.*, at 38, and expressly denied that "the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress," *id.*, at 37. And when he testified, he made the point clearer:

"So what we have done . . . [in New York] is that we have . . . made it a part of our judicial machinery. That is what we have done. But it can not be done under our constitutional form of government and cover the great fields of commerce until you gentlemen do it, in the exercise of your power to confer jurisdiction on the Federal courts. The theory on which you do this is that you have the right to tell the Federal courts how to proceed." *Id.*, at 17.

The legislative history which the Court recites to support its assertion that Congress relied principally on its power over commerce consists mainly of statements that the Act was designed to cover only contracts in commerce, and that is certainly true. But merely because the Act was designed to enforce arbitration agreements only in contracts in commerce, does not mean that Congress was primarily relying on its power over commerce in supplying that remedy of enforceability.

[22] Cohen & Dayton, *supra*, at 276.

admiralty contracts." 65 Cong. Rec. 1931 (1924). (Emphasis added.)

Finally, there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts [23] or to provide an independent federal-question basis for jurisdiction in federal courts apart from diversity jurisdiction.[24] The absence of both of these effects—which normally follow from legislation of federal substantive law—seems to militate against the view that Congress was creating a body of federal substantive law.

Suffice it to say that Judge Medina chose the alternative of construing the Act to create federal substantive law in order to avoid its emasculation under *Erie* and *Bernhardt*. But Judge Medina was not content to stop there with a holding that the Act makes arbitration agreements in a contract involving commerce enforceable in federal court even though the basis of jurisdiction is diversity and state law does not enforce such

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[23] See, *e. g.*, Cohen & Dayton, *supra*, at 277; Committee on Commerce, Trade & Commercial Law, *supra*, at 155, 156. Mr. Rose, representing the Arbitration Society of America, suggested that the Act might have the beneficial effect of encouraging States to enact similar laws, Joint Hearings, *supra*, at 28, but Mr. Cohen assured Congress:

"Nor can it be said that the Congress of the United States, directing its own courts . . . , would infringe upon the provinces or prerogatives of the States. . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced . . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement." *Id.*, at 39–40.

[24] This seems implicit in § 3's provision for a stay by a "court in which such suit is pending" and § 4's provision that enforcement may be ordered by "any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties."

agreements. The problem in *Robert Lawrence,* as here, was not whether an arbitration agreement is enforceable, for the New York Arbitration Act, upon which the federal Act was based, enforces an arbitration clause in the same terms as the federal Act. The problem in *Robert Lawrence,* and here, was rather whether the arbitration clause in a contract induced by fraud is "separable." Under New York law, it was not: general allegations of fraud in the inducement would, as a matter of state law, put in issue the making of the arbitration clause. So to avoid this application of state law, Judge Medina went further than holding that the federal Act makes agreements to arbitrate enforceable: he held that the Act creates a "body of law" that "encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs." 271 F. 2d, at 409.

Thus, 35 years after the passage of the Arbitration Act, the Second Circuit completely rewrote it. Under its new formulation, § 2 now makes arbitration agreements enforceable "save upon such grounds as exist at *federal* law for the revocation of any contract." And under § 4, before enforcing an arbitration agreement, the district court must be satisfied that "the making of the agreement for arbitration, *as a matter of federal law,* is not in issue." And then when Judge Medina turned to the task of "the formulation of the principles of federal substantive law necessary for this purpose," 271 F. 2d, at 409, he formulated the separability rule which the Court today adopts—not because § 4 provided this rule as an "explicit answer," not because he looked to the intention of the parties, but because of his notion that the separability rule would further a "liberal policy of promoting arbitration." 271 F. 2d, at 410.[25]

[25] It should be noted that the New York courts apparently do not find any inconsistency between application of a nonseparability rule

Today, without expressly saying so, the Court does precisely what Judge Medina did in *Robert Lawrence*. It is not content to hold that the Act does all it was intended to do: make arbitration agreements enforceable in federal courts if they are valid and legally existent under state law. The Court holds that the Act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means. Even if Congress intended to create substantive rights by passage of the Act, I am wholly convinced that it did not intend to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory.

First. The legislative history is clear that Congress intended no such thing. Congress assumed that arbitration agreements were recognized as valid by state and federal law.[26] Courts would give damages for their breach, but would simply refuse to specifically enforce them. Congress thus had one limited purpose in mind: to provide a party to such an agreement "a remedy formerly denied him." [27] "Arbitration under the Federal . . . [statute] is simply a new procedural remedy." [28] The Act "creates no new legislation, grants no new rights, except a remedy to enforce . . . ." [29] The drafters of the Act were very explicit:

> "A Federal statute providing for the enforcement of arbitration agreements does relate solely to pro-

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and that State's policy of enforcing arbitration agreements, a policy embodied in a statute from which the federal Act was copied.

[26] S. Rep. No. 536, 68th Cong., 1st Sess., 2 (1924); Joint Hearings, *supra*, at 38.

[27] Cohen & Dayton, *supra*, at 271.

[28] *Id.*, at 279.

[29] 65 Cong. Rec. 1931 (1924).

cedure of the Federal courts. *It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws.* To be sure *whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made.*" Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153, 154. (Emphasis added.)

"Neither is it true that such a statute, declaring arbitration agreements to be valid, is the source of their existence as a matter of substantive law. . . .

"So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 276–277.

All this indicates that the § 4 inquiry of whether the making of the arbitration agreement is in issue is to be determined by reference to state law, not federal law formulated by judges for the purpose of promoting arbitration.

Second. The avowed purpose of the Act was to place arbitration agreements "upon the same footing as other contracts." [30] The separability rule which the Court applies to an arbitration clause does not result in equality between it and other clauses in the contract. I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it has to seek rescission of the whole, not tidbits, and is not given the option of denying the existence of some clauses and affirming the existence of others. Here F & C agreed both to perform consulting services for Prima and not to

[30] H. R. Rep. No. 96, 68th Cong., 1st Sess. (1924).

compete with Prima. Would any court hold that those two agreements were separable, even though Prima in agreeing to pay F & C not to compete did not directly rely on F & C's representations of being solvent? The simple fact is that Prima would not have agreed to the covenant not to compete or to the arbitration clause but for F & C's fraudulent promise that it would be financially able to perform consulting services. As this Court held in *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 298:

> "Whether a number of promises constitute one contract [and are non-separable] or more than one is to be determined by inquiring 'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.'"

Under this test, all of Prima's promises were part of one, inseparable contract.

Third. It is clear that had this identical contract dispute been litigated in New York courts under its arbitration act, Prima would not be required to present its claims of fraud to the arbitrator if the state rule of nonseparability applies. The Court here does not hold today, as did Judge Medina,[31] that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect—which the Court seems to leave up in the air—would flout the intention of the framers of the Act.[32] Yet under this Court's opinion today—that the Act supplies not only the remedy of enforcement but a body of federal doctrines to determine the validity of an arbitration agreement—failure to make the Act

[31] "This is a declaration of national law equally applicable in state or federal courts." 271 F. 2d, at 407.

[32] See n. 23, *supra*.

applicable in state courts would give rise to "forum shopping" and an unconstitutional discrimination that both *Erie* and *Bernhardt* were designed to eliminate. These problems are greatly reduced if the Act is limited, as it should be, to its proper scope: the mere enforcement in federal courts of valid arbitration agreements.

IV.

The Court's summary treatment of these issues has made it necessary for me to express my views at length. The plain purpose of the Act as written by Congress was this and no more: Congress wanted federal courts to enforce contracts to arbitrate and plainly said so in the Act. But Congress also plainly said that whether a contract containing an arbitration clause can be rescinded on the ground of fraud is to be decided by the courts and not by the arbitrators. Prima here challenged in the courts the validity of its alleged contract with F & C as a whole, not in fragments. If there has never been any valid contract, then there is not now and never has been anything to arbitrate. If Prima's allegations are true, the sum total of what the Court does here is to force Prima to arbitrate a contract which is void and unenforceable before arbitrators who are given the power to make final legal determinations of their own jurisdiction, not even subject to effective review by the highest court in the land. That is not what Congress said Prima must do. It seems to be what the Court thinks would promote the policy of arbitration. I am completely unable to agree to this new version of the Arbitration Act, a version which its own creator in *Robert Lawrence* practically admitted was judicial legislation. Congress might possibly have enacted such a version into law had it been able to foresee subsequent legal events, but I do not think this Court should do so.

I would reverse this case.

WISCONSIN ET AL. *v.* ILLINOIS ET AL.

No. 1, Original. Decree April 21, 1930.—Decree enlarged May 22, 1933.—Decree entered June 12, 1967.*

The Court, having reopened Nos. 1, 2 and 3, Original, and having granted leave to file No. 11, Original, entered this decree.

Decree reported, 281 U. S. 696; decree enlarged, 289 U. S. 395.

Solicitor General Marshall for the United States.

Bronson C. La Follette, Attorney General, and *William F. Eich,* Assistant Attorney General, for the State of Wisconsin.

Douglas M. Head, Attorney General, and *Raymond A. Haik,* Special Assistant Attorney General, for the State of Minnesota.

William B. Saxbe, Attorney General, and *Jay C. Flowers* for the State of Ohio.

William C. Sennett, Attorney General, and *Thomas W. Corbett,* Deputy Attorney General, for the Commonwealth of Pennsylvania.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Nicholas V. Olds* and *Esther E. Newton,* Assistant Attorneys General, for the State of Michigan.

Louis J. Lefkowitz, Attorney General, and *Randall J. Leboeuf, Jr.,* Special Assistant Attorney General, for the State of New York.

William G. Clark, Attorney General, *Thomas M. Thomas* and *Robert L. Stern,* Special Assistant Attorneys General, and *George A. Lane* for the State of Illinois et al.

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*Together with No. 2, Original, *Michigan* v. *Illinois et al.,* No. 3, Original, *New York* v. *Illinois et al.,* and No. 11, Original, *Illinois* v. *Michigan et al.*

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DECREE.

This Court having reopened Original cases Nos. 1, 2, and 3, and having granted leave to file Original case No. 11, and having referred all such cases to a Special Master who has filed his Report, and the parties having agreed to the form of the decree, the Findings of Fact in the Report are hereby adopted, and it being unnecessary at this time to consider the Special Master's legal conclusions,

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. The State of Illinois and its municipalities, political subdivisions, agencies, and instrumentalities, including, among others, the cities of Chicago, Evanston, Highland Park, Highwood and Lake Forest, the villages of Wilmette, Kenilworth, Winnetka, and Glencoe, the Elmhurst-Villa Park-Lombard Water Commission, the Chicago Park District and the Metropolitan Sanitary District of Greater Chicago, their employees and agents and all persons assuming to act under their authority, are hereby enjoined from diverting any of the waters of Lake Michigan or its watershed into the Illinois waterway, whether by way of domestic pumpage from the lake the sewage effluent derived from which reaches the Illinois waterway, or by way of storm runoff from the Lake Michigan watershed which is diverted into the Sanitary and Ship Canal, or by way of direct diversion from the lake into the canal, in excess of an average for all of them combined of 3,200 cubic feet per second. "Domestic pumpage," as used in this decree, includes water supplied to commercial and industrial establishments and "domestic use" includes use by such establishments. The water permitted by this decree to be diverted from Lake Michigan and its watershed may be apportioned by the State of Illinois among its municipalities, political subdivisions, agencies, and instrumen-

talities for domestic use or for direct diversion into the Sanitary and Ship Canal to maintain it in a reasonably satisfactory sanitary condition, in such manner and amounts and by and through such instrumentalities as the State may deem proper, subject to any regulations imposed by Congress in the interests of navigation or pollution control.

2. The amount of water diverted into the Sanitary and Ship Canal directly from Lake Michigan and as storm runoff from the Lake Michigan watershed shall be determined by deducting from the total flow in the canal at Lockport (a) the total amount of domestic pumpage from Lake Michigan and from ground sources in the Lake Michigan watershed, except to the extent that any such ground sources are supplied by infiltration from Lake Michigan, by the State of Illinois and its municipalities, political subdivisions, agencies, and instrumentalities the sewage effluent derived from which reaches the canal, (b) the total amount of domestic pumpage from ground and surface sources outside the Lake Michigan watershed the sewage effluent derived from which reaches the canal, (c) the total estimated storm runoff from the upper Illinois River watershed reaching the canal, (d) the total amount of domestic pumpage from all sources by municipalities and political subdivisions of the States of Indiana and Wisconsin the sewage effluent derived from which reaches the canal, and (e) any water diverted by Illinois, with the consent of the United States, into Lake Michigan from any source outside the Lake Michigan watershed.

3. For the purpose of determining whether the total amount of water diverted from Lake Michigan by the State of Illinois and its municipalities, political subdivisions, agencies, and instrumentalities is not in excess of the maximum amount permitted by this decree, the amounts of domestic pumpage from the lake by the

State and its municipalities, political subdivisions, agencies, and instrumentalities the sewage and sewage effluent derived from which reaches the Illinois waterway, either above or below Lockport, shall be added to the amount of direct diversion into the canal from the lake and storm runoff reaching the canal from the Lake Michigan watershed computed as provided in paragraph 2 of this decree. The accounting period shall consist of the period of 12 months terminating on the last day of February. A period of five years, consisting of the current annual accounting period and the previous four such periods (all after the effective date of this decree), shall be permitted, when necessary, for achieving an average diversion which is not in excess of the maximum permitted amount; provided, however, that the average diversion in any annual accounting period shall not exceed one hundred ten (110) per cent of the maximum amount permitted by this decree. The measurements and computations required by this decree shall be made by the appropriate officers, agencies, or instrumentalities of the State of Illinois under the general supervision and direction of the Corps of Engineers of the United States Army.

4. The State of Illinois may make application for a modification of this decree so as to permit the diversion of additional water from Lake Michigan for domestic use when and if it appears that the reasonable needs of the Northeastern Illinois Metropolitan Region (comprising Cook, Du Page, Kane, Lake, McHenry, and Will Counties) for water for such use cannot be met from the water resources available to the region, including both ground and surface water and the water permitted by this decree to be diverted from Lake Michigan, and if it further appears that all feasible means reasonably available to the State of Illinois and its municipalities, political subdivisions, agencies, and instrumentalities

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have been employed to improve the water quality of the Sanitary and Ship Canal and to conserve and manage the water resources of the region and the use of water therein in accordance with the best modern scientific knowledge and engineering practice.

5. This decree shall become effective on March 1, 1970, and shall thereupon supersede the decree entered by this Court in Nos. 1, 2, and 3, Original Docket, on April 21, 1930, as enlarged May 22, 1933, provided that for the period between January 1, 1970, and March 1, 1970, the amount of water diverted by Illinois into the Sanitary and Ship Canal (determined in accordance with paragraph 2 of this decree) shall not exceed an average of 1,500 cubic feet per second.

6. The complaint of the State of Illinois in No. 11, Original Docket, on behalf of its instrumentality, the Elmhurst-Villa Park-Lombard Water Commission, is hereby dismissed, without prejudice to that Commission sharing in the water permitted by this decree to be diverted from Lake Michigan.

7. Any of the parties hereto may apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the suits in Nos. 1, 2, and 3, Original Docket, for the purpose of making any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.

8. All the parties to these proceedings shall bear their own costs. The costs and expenses of the Special Master shall be equally divided between the plaintiffs as a group and the defendants as a group in Nos. 1, 2, and 3, Original Docket. The costs and expenses thus imposed upon the plaintiffs and defendants shall be borne by the individual plaintiffs and defendants, respectively, in equal shares.

JACOBS ET AL. *v.* NEW YORK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 660. Decided June 12, 1967.

Appeal dismissed.

Emile Z. Berman for appellants.

Frank S. Hogan for appellee.

Edward De Grazia and *John R. Kramer* for the National Students Association, as *amicus curiae*, in support of appellants.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

MR. JUSTICE BRENNAN would affirm the judgment of the lower court.

MR. JUSTICE FORTAS would reverse the judgment of the lower court.

MR. CHIEF JUSTICE WARREN, dissenting.

I dissent from the Court's dismissal of this appeal as moot. These appellants were convicted by a three-judge bench of the Criminal Court of New York City of violating § 1141 of the Penal Law of New York, which provides in pertinent part:

> "1. A person who sells, lends, gives away, distributes, shows or transmutes . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic . . . motion picture film . . . which may or may not require mechanical or other means to be

transmuted into auditory, visual or sensory representations of such character . . . .

"2. . . . Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment . . . ."

On August 7, 1964, appellants Jacobs and Mekas were sentenced to 60 days in the New York City Workhouse, with execution of the sentence suspended. Appellant Karpf received a suspended sentence.

In dismissing this appeal for mootness, the Court apparently bases its action upon the fact that under New York law, the maximum time during which appellants could have had their suspended sentences revoked and replaced by prison sentences was one year from the date of the original sentences. N. Y. Code Crim. Proc. § 470–a. The State argues that this appeal is moot because more than one year has run from August 7, 1964, and appellants are under no present threat of imprisonment. Moreover, the State contends that neither New York law nor federal law imposes any further penalty for conviction of the misdemeanor involved in this case.

I cannot accept this argument. The practical result of the Court's willingness to dismiss this appeal as moot is that States may insulate their convictions under laws raising constitutional questions from review on the merits by this Court by the simple expedient of a suspended sentence where a time limit for the imposition of an executed sentence is short enough to run before an appeal can be taken to this Court. A State could thus keep a person under continual threat of imprisonment without review by this Court of any constitutional objections to his convictions by a continued series of convictions and suspended sentences. By the time any single conviction could be brought to this Court, the defendant's jeopardy under that particular sentence

would be concluded. However, the defendant could still be oppressed by subsequent suspended sentences which would themselves be unreviewable by the time the defendant could bring his case to this Court. I cannot agree that the commands of the United States Constitution can be this easily suspended by the States. Moreover, this power, which under this dismissal can be exercised without constitutional restraint, gives the State a weapon which might in some cases be used to suppress constitutionally protected conduct. After a person has been convicted under a statute which limits his right of expression, his subsequent conduct will be significantly chilled by the conviction on his record. Particularly where, as in this case, the convictions stem from conduct which is directly in line with appellants' profession as movie exhibitors, they may justifiably fear that any future conduct running the danger of infringing the statute will be more harshly treated because of the previous unreviewed conviction. Who can doubt that a judge's reaction to another conviction under § 1141 of the New York Penal Law would not be colored by the fact of a prior conviction? For example, these appellants argue in this case that they should not be constitutionally convicted because their conduct demonstrates their good-faith belief that they were not exhibiting obscene material. They may have felt that even if a state judge did not accept their constitutional argument based on their good faith, he might at least give the appellants the most lenient sentence. However, once they have been convicted and have been unable to have the constitutionality of the conviction passed upon by this Court, their situation is radically different. Even if they have been convicted of engaging in what this Court might finally determine to be constitutionally protected conduct, they are likely to order their future conduct on the basis of the assumed validity of the previous convic-

tion. When we are dealing with First Amendment freedoms, freedoms we have held require breathing space to survive, see *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), *NAACP* v. *Button*, 371 U. S. 415 (1963), we should be extremely slow to accept mootness doctrines which grant the States an unreviewable power to suppress modes of expression.

I believe the Court is straining the mootness doctrine and in doing so is bypassing important constitutional questions in the obscenity area which this Court has an obligation to decide. In this case, we are presented with an opportunity for injecting some clarity into the problem of what constitutes obscenity, a problem which has become increasingly muddled and difficult for the federal and state courts and legislatures to understand since we first defined the reach of the First Amendment in this area in *Roth* v. *United States*, 354 U. S. 476 (1957). The questions presented are not easy, but I am sure that it is our constitutional duty to grapple with them and to present to the country an understandable statement of how far the First Amendment restricts legislative attempts to control obscene material. Similarly, the Court dismisses as moot the appeal in No. 993, *Tannenbaum* v. *New York*, *post*, p. 439, because a jail sentence was suspended and a fine has been paid. That case raises the important question never addressed by this Court of the constitutionality of "variable obscenity" laws which restrict the sale of obscene materials to minors on the basis of definitions of obscenity drawn expressly with minors in mind. While I do not express a view as to the merits of this question, I think the great importance of the question to the Nation, and the responsibility of this Court to elaborate the scope and meaning of the First Amendment, should require the Court to note jurisdiction and hear the case on the merits. A similar strained conception of mootness resulting in a failure of decision on the merits

recalls the Court's avoidance of a constitutional decision in the short *per curiam* in *Parker* v. *Ellis,* 362 U. S. 574 (1960). I expressed the belief in that case, which I reaffirm here, that this Court has an obligation to decide, and not avoid, important constitutional questions which are concretely presented to it by litigants having adverse interests. If Congress had intended that our jurisdiction be discretionary in all cases, it would not have differentiated in the statutes defining our appellate jurisdiction between appeals and writs of certiorari.

As MR. JUSTICE DOUGLAS points out in his dissent to the dismissal for mootness in this case, there are additional reasons why this case should not be deemed moot. Appellants' film and equipment were seized by the police at the time of their arrests. Of course, if appellants were not convicted, or if their convictions were reversed, they would be entitled under state law to the return of their property. On the other hand, our dismissal leaves these convictions unchallenged, and appellants' film and equipment will be subject to forfeiture. N. Y. Penal Law § 1141–c, N. Y. Code Crim. Proc. § 22–a. Thus, appellants have a clear pecuniary interest in the outcome of this appeal. Appellants also point to the likelihood that these convictions will impair their ability to secure a license to operate a motion picture theater. Under the Administrative Code of the City of New York, which establishes a comprehensive system of licensing procedures, the Department of Licenses is charged with assuring that motion picture theatres are not offensive to "public morals." § B32–26.0. These convictions will surely affect appellants' ability to procure a license to exhibit motion pictures in the future.

Since I believe this appeal cannot be dismissed as moot, I believe the Court must consider the case on the merits. I am satisfied that these convictions should be affirmed. Under the standards set out by the Court in *Roth* v.

United States, 354 U. S. 476 (1957), this film is not within the protections of the First Amendment. We formulated the test in that case as being whether the material was utterly without social value, whether it went substantially beyond customary limits of candor in representing sexual matters, and whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.*, at 489. This film falls outside the range of expression protected by the First Amendment according to the criteria set out in *Roth*.

For the reasons I have given, I would consider this appeal on the merits and I would affirm these convictions.

MR. JUSTICE DOUGLAS, dissenting.

We have here two cases in which appellants have been convicted under a State's obscenity statutes. In No. 660, appellants were convicted of showing an allegedly obscene motion picture. They were given suspended sentences and the time during which the suspended sentences could have been revoked and prison sentences imposed has now passed. In No. 993, *post*, p. 439, appellant was convicted of selling an allegedly obscene magazine to a person under 18. He was sentenced to 30 days and fined $100. The fine has been paid and the sentence was suspended. The First Amendment issues in these cases are substantial. Nonetheless, they are dismissed as moot because the appellants are no longer subject to the custody of the State and in No. 993 the fine has been paid. The Court apparently believes this result to be commanded by our prior cases. I disagree.

The mootness doctrine is expressive of the need for antagonistic parties whose vigorous argument will sharpen the issues. It is part of the "case or controversy" requirement of Article III. *St. Pierre* v. *United States*, 319 U. S. 41, 42. But it is not so rigid as to defeat

substantial rights, nor so inflexible as to prevent this Court from facing serious constitutional questions. Thus, we have held that service of a sentence does not render a case moot where the conviction, if allowed to stand, will result in collateral disabilities such as a loss of civil rights. *Fiswick* v. *United States*, 329 U. S. 211; *United States* v. *Morgan*, 346 U. S. 502.

In the present cases, we are in the area of the First Amendment. Over and over again we have stressed that First Amendment rights need "breathing space to survive" (*NAACP* v. *Button*, 371 U. S. 415, 433); and we have been watchful lest coercive measures exercise an *in terrorem* effect which intimidates people from exercising their First Amendment rights. See, *e. g.*, *Speiser* v. *Randall*, 357 U. S. 513; *NAACP* v. *Button*, *supra*; *Keyishian* v. *Board of Regents*, 385 U. S. 589. We have been mindful that "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *NAACP* v. *Button*, *supra*, at 433. Accordingly, we have modified traditional rules of standing and prematurity to fit the peculiarities necessary to ensure adequate protection of First Amendment rights. See *Dombrowski* v. *Pfister*, 380 U. S. 479.

The *in terrorem* effect of denying review to cases such as these because sentences have been suspended or short sentences served is obvious. Sentences for violations of obscenity statutes are often suspended and generally short. If those convicted cannot obtain ultimate review of such convictions, merely because of the shortness of the sentences and the slowness of the judicial process, many will choose to comply with what may be an invalid statute. Many may steer wide and refrain from showing or selling protected material. First Amendment rights are thus stifled. If a practice such as this were shown to exist, its *in terrorem* effect on all publishers would certainly be sufficiently clear as to give any

of them standing to bring an action for declaratory relief. Its *in terrorem* effect on a publisher who has actually felt the harsh impact of the law is so obvious that its continuing deterrent effect upon him should keep his case from becoming moot.

In No. 660, appellants' film and motion picture equipment were seized at the time of their arrests. They argue that at the conclusion of this proceeding they can bring an action to recover possession of the film and equipment. If their convictions are allowed to stand, along with the holding that the film is obscene, the film and equipment will be subject to forfeiture. They also argue that the department of licenses may suspend their motion picture theater license on the ground that they have shown obscene pictures. Perhaps they could relitigate the question of the film's obscenity in such proceedings. That is, of course, a matter of state law. But if appellants are correct, the convictions may entail sufficient collateral consequences that distinguish them from *St. Pierre* v. *United States, supra,* and bring them within the *Fiswick* and *Morgan* cases.

The questions of mootness loom so large in the setting of the First Amendment that they should at least be briefed and argued.

TANNENBAUM *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 993. Decided June 12, 1967.

18 N. Y. 2d 268, 220 N. E. 2d 783, appeal dismissed.

Osmond K. Fraenkel and *Stanley Fleishman* for appellant.

Frank S. Hogan for appellee.

Horace S. Manges for the American Book Publishers Council, Inc., as *amicus curiae,* in support of appellant.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

MR. JUSTICE BRENNAN would reverse the judgment of the lower court.

MR. CHIEF JUSTICE WARREN, dissenting.

I dissent from the dismissal of this appeal as moot for the reasons stated in my dissent in *Jacobs* v. *New York, ante,* p. 431. In my view, the question presented by this case is extremely important and requires a decision on the merits by this Court. I would note probable jurisdiction and set the case for argument.

MR. JUSTICE DOUGLAS dissents. (See dissent set forth in *Jacobs* v. *New York, ante,* at 436.)

KENEY *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, NEW YORK.

No. 2. Decided June 12, 1967.

Certiorari granted; reversed.

Eugene Gressman for petitioner.

James H. Biben for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the County Court of Monroe County, New York, is reversed. *Redrup* v. *New York,* 386 U. S. 767.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States,* 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

FRIEDMAN *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 7. Decided June 12, 1967.

Certiorari granted; reversed.

Ira H. Holley and *Eugene Gressman* for petitioner.

Frank S. Hogan for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate Term of the Supreme Court of New York, First Judicial Department, is reversed. *Redrup* v. *New York,* 386 U. S. 767.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States,* 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

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RATNER ET AL. *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO.

No. 10. Decided June 12, 1967.

Certiorari granted; reversed.

Richard A. Lavine for petitioners.

Thomas C. Lynch, Attorney General of California, and *Robert R. Granucci* and *Charles W. Rumph*, Deputy Attorneys General, for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate Department of the Superior Court of California, County of San Mateo, is reversed. *Redrup* v. *New York*, 386 U. S. 767.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN would affirm.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

COBERT *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 21. Decided June 12, 1967.

Certiorari granted; reversed.

Ephraim London for petitioner.

Frank S. Hogan for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Court of Appeals of New York is reversed. *Redrup* v. *New York,* 386 U. S. 767.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN would affirm.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States,* 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

June 12, 1967. 388 U. S.

SHEPERD ET AL. *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 26. Decided June 12, 1967.

Certiorari granted; reversed.

Ira H. Holley and *Eugene Gressman* for petitioners.

Frank S. Hogan for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate Term of the Supreme Court of New York, First Judicial Department, is reversed. *Redrup* v. *New York*, 386 U. S. 767.

THE CHIEF JUSTICE and MR. JUSTICE CLARK would affirm. *Mishkin* v. *New York*, 383 U. S. 502.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

NEW YORK CENTRAL RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 58. Decided June 12, 1967.

244 F. Supp. 955, affirmed.

John A. Daily for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Robert W. Ginnane and *Robert S. Burk* for the United States et al., and *Peter T. Beardsley, Harry J. Jordan, William R. Rubbert, R. Edwin Brady, Bryce Rea, Jr., James E. Wilson, Guy H. Postell, Ferdinand Born, LeGrand A. Carlston, F. H. Lynch, Jr., Roland Rice, Homer S. Carpenter, John S. Fessenden* and *Richard R. Sigmon* for the American Trucking Associations, Inc., et al., appellees.

PER CURIAM.

The motion of American Trucking Associations, Inc., et al., to be added as parties appellee is granted.

The motion to affirm is granted and those portions of the judgment of the District Court from which appellant is appealing are affirmed.

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AVANSINO ET AL. *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 72. Decided June 12, 1967.

Certiorari granted; reversed.

Eugene Gressman for petitioners.

Frank S. Hogan for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate Term of the Supreme Court of New York, First Judicial Department, is reversed. *Redrup* v. *New York,* 386 U. S. 767.

THE CHIEF JUSTICE and MR. JUSTICE CLARK would affirm. *Mishkin* v. *New York,* 383 U. S. 502.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States,* 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

ADAY ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 149. Decided June 12, 1967.

Certiorari granted; 357 F. 2d 855, reversed.

Stanley Fleishman for petitioners.

Solicitor General Marshall for the United States.

Melvin L. Wulf, Rolland R. O'Hare and *Erwin B. Ellmann* for the American Civil Liberties Union et al., and *Horace S. Manges* for the American Book Publishers Council, Inc., as *amici curiae*, in support of the petition.

Charles H. Keating, Jr., and *James J. Clancy* for Citizens for Decent Literature, Inc., as *amicus curiae*, in opposition to the petition.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Sixth Circuit is reversed. *Redrup* v. *New York*, 386 U. S. 767.

THE CHIEF JUSTICE and MR. JUSTICE BRENNAN would grant the petition, vacate the judgment, and remand in light of *Memoirs* v. *Massachusetts*, 383 U. S. 413.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN concurs in the reversal on the basis of the reasoning set forth in his opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478.

CORINTH PUBLICATIONS, INC. *v.* WESBERRY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 227. Decided June 12, 1967.

Certiorari granted; 221 Ga. 704, 146 S. E. 2d 764, reversed.

Stanley Fleishman for petitioner.

Arthur K. Bolton, Attorney General of Georgia, and *G. Ernest Tidwell,* Executive Assistant Attorney General, for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Georgia is reversed.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States,* 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

BOOKS, INC. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 323. Decided June 12, 1967.

Certiorari granted; 358 F. 2d 935, reversed.

Stanley Fleishman for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson, Robert S. Erdahl and *Marshall Tamor Golding* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the First Circuit is reversed. *Redrup* v. *New York*, 386 U. S. 767.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN concurs in the reversal on the basis of the reasoning set forth in his opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478.

ROSENBLOOM *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 366. Decided June 12, 1967.

Certiorari granted; reversed.

Seymour Horwitz and *Melvin L. Wulf* for petitioner.

James B. Wilkinson for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Appeals of Virginia is reversed. *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

BURKARD ET AL. *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 807. Decided June 12, 1967.*

18 N. Y. 2d 148, 219 N. E. 2d 183, appeals dismissed and certiorari denied.

Victor Rabinowitz, Leonard B. Boudin and *Samuel A. Neuberger* for appellants in No. 807. *Edward Bennett Williams* and *Raymond W. Bergan* for appellants in No. 808.

Frank S. Hogan for appellee in both cases.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

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*Together with No. 808, *Habel et al.* v. *New York*, also on appeal from the same court.

June 12, 1967. 388 U. S.

A QUANTITY OF COPIES OF BOOKS ET AL. *v.* KANSAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 865. Decided June 12, 1967.

Certiorari granted; 197 Kan. 306, 416 P. 2d 703, reversed.

Stanley Fleishman for petitioners.

Robert C. Londerholm, Attorney General of Kansas, for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Kansas is reversed. *Redrup* v. *New York,* 386 U. S. 767.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument in light of *A Quantity of Books* v. *Kansas,* 378 U. S. 205.

MR. JUSTICE CLARK would grant the petition and affirm the judgment.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States,* 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

WHITEHOUSE TRUCKING, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 1255. Decided June 12, 1967.

261 F. Supp. 9, affirmed.

Robert P. Mone and *James M. Burtch* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Nahum Litt* for the United States et al., and *James E. Wilson* and *Edward G. Villalon* for Hennis Freight Lines, Inc., et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MAZES *v.* OHIO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 896. Decided June 12, 1967.

Certiorari granted; 7 Ohio St. 2d 136, 218 N. E. 2d 725, reversed.

Stanley M. Dietz for petitioner.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Ohio is reversed. *Redrup* v. *New York*, 386 U. S. 767.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE HARLAN would grant the petition and set the case for oral argument on the Ohio statute.

SCHACKMAN ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 995. Decided June 12, 1967.

Judgments reversed.

Burton Marks for appellants.

Roger Arnebergh and *Philip E. Grey* for appellee.

PER CURIAM.

The judgments of the Superior Court of California, County of Los Angeles, are reversed. *Redrup* v. *New York*, 386 U. S. 767.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN would affirm the judgments of the lower court. *Ginzburg* v. *United States*, 383 U. S. 463.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1093. Decided June 12, 1967.

263 F. Supp. 650, affirmed.

Harry Wilmarth for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Betty Jo Christian* for the United States et al., and *Robert H. Bierma* and *David L. Wilson* for appellee Pennsylvania Railroad Co.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted and the case set for oral argument.

LANDAU *v.* FORDING, CHIEF OF POLICE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 1164. Decided June 12, 1967.

Certiorari granted; 245 Cal. App. 2d 820, 54 Cal. Rptr. 177, affirmed.

Marshall W. Krause for petitioner.

Robert T. Anderson and *Robert P. Berkman* for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Court of Appeal of California, First Appellate District, is affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS would grant the petition and reverse.

BELL TELEPHONE LABORATORIES, INC., ET AL. *v.* BUREAU OF REVENUE OF NEW MEXICO ET AL.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

No. 1265. Decided June 12, 1967.

78 N. M. 78, 428 P. 2d 617, appeal dismissed.

William C. Schaab for appellants.

Boston E. Witt, Attorney General of New Mexico, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

LUPTON MANUFACTURING CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 1296. Decided June 12, 1967.

Appeal dismissed.

Leonard J. Emmerglick for appellant.

Solicitor General Marshall, Assistant Attorney General Turner and *Howard E. Shapiro* for the United States, and *Herbert A. Bergson, Daniel H. Margolis, Donald L. Hardison* and *William K. Unverzagt* for Aluminum Co. of America et al., appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed.

CANTON POULTRY, INC., ET AL. *v.* CONNER, COMMISSIONER OF AGRICULTURE OF FLORIDA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 1315. Decided June 12, 1967.

263 F. Supp. 1008, vacated and remanded.

Homer S. Durden, Jr., for appellants.

Earl Faircloth, Attorney General of Florida, and *Robert A. Chastain*, Assistant Attorney General, for appellee.

PER CURIAM.

The judgment is vacated and the case remanded to the District Court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. *Pennsylvania Public Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U. S. 281, 282.

PARKS *v.* SIMPSON TIMBER CO. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1335. Decided June 12, 1967.*

Certiorari granted; 369 F. 2d 324, vacated and remanded.

Eugene Gressman for petitioner.

Kenneth E. Roberts for respondent Simpson Timber Co.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats.*, 382 U. S. 283. The case is remanded to the United States Court of Appeals for the Ninth Circuit in order that that court may pass upon the issues in this case not covered by its prior opinion.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that certiorari should be denied.

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*[REPORTER'S NOTE: This opinion is reported as amended by order of the Court entered October 16, 1967, 389 U. S. 909.]

SAVIO ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA.

No. 1399. Decided June 12, 1967.

Appeal dismissed and certiorari denied.

Norman Leonard for appellants.

Thomas C. Lynch, Attorney General of California, and *Robert R. Granucci,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PIERREL *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 880, Misc. Decided June 12, 1967.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Solicitor General Marshall for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SANCHEZ *v.* COX, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 79, Misc. Decided June 12, 1967.

Certiorari granted; 357 F. 2d 260, vacated and remanded.

Petitioner *pro se.*

Boston E. Witt, Attorney General of New Mexico, and *Thomas O. Olson,* Special Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the District of New Mexico for reconsideration in light of the fact that the transcript of evidence can apparently now be made available.

BALLES *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 836, Misc. Decided June 12, 1967.

47 N. J. 331, 221 A. 2d 1, appeal dismissed and certiorari denied.

Appellant *pro se.*

Martin J. Queenan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

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STELLAS *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 934, Misc. Decided June 12, 1967.

Certiorari granted; 366 F. 2d 266, vacated and remanded.

Anna Mamalakis Pappas and *Omar Z. Ghobashy* for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson and *Beatrice Rosenberg* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of New York with directions that it be returned to the Immigration and Naturalization Service for further administrative proceedings.

SANDOVAL *v.* UTAH.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH.

No. 1107, Misc. Decided June 12, 1967.

Certiorari granted; vacated and remanded.

Jimi Mitsunaga for petitioner.

Phil L. Hansen, Attorney General of Utah, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Utah in light of the representations of the Attorney General that the petitioner was entitled to the transcription of the mechanical recording of the juvenile court hearing at the expense of the Salt Lake County or other governmental entity having jurisdiction.

June 12, 1967. 388 U. S.

HADLEY *v.* MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 1179, Misc. Decided June 12, 1967.

351 Mass. 439, 222 N. E. 2d 681, vacated and remanded.

Louis M. Nordlinger for appellant.

Elliot L. Richardson, Attorney General of Massachusetts, and *Willie J. Davis*, Assistant Attorney General, for appellee.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the case is remanded to the Supreme Judicial Court of Massachusetts for further consideration in light of *Camara* v. *Municipal Court of the City and County of San Francisco*, 387 U. S. 523.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART dissent and would affirm the judgment for the reasons stated in MR. JUSTICE CLARK's dissenting opinion in *Camara* v. *Municipal Court of the City and County of San Francisco*, 387 U. S., at 546.

HEMPHILL *v.* ILLINOIS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 1342, Misc. Decided June 12, 1967.

Certiorari granted; vacated and remanded.

Petitioner *pro se.*

William G. Clark, Attorney General of Illinois, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois with instructions to appoint counsel and hear the appeal. *Milani* v. *Illinois,* 386 U. S. 12.

FOX *v.* OREGON.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON.

No. 1421, Misc. Decided June 12, 1967.

Certiorari granted; 245 Ore. 440, 421 P. 2d 977, vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Oregon for further consideration in light of *Anders* v. *California*, 386 U. S. 738.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART are of the opinion that certiorari should be denied.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 466 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS OF JUNE 12, 1967.

JUNE 12, 1967.

Miscellaneous Orders.

No. 6, October Term, 1964. HENRY *v.* MISSISSIPPI. Respondent's motions that this Court reinstate the judgment of conviction and retax costs are denied. It is noted that the opinion of the Mississippi Supreme Court states: "If this case were again before us, we would reaffirm our former opinion and judgment." Further proceedings in the cause should be addressed to any new final judgment which may be entered by the Mississippi courts. Cf. *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 245–246; *Campbell* v. *United States*, 365 U. S. 85, 99.

MR. JUSTICE BLACK concurs in the denial of respondent's motions.

[For earlier orders herein, see, *e. g.*, 381 U. S. 908.]

No. —. OSBORN *v.* UNITED STATES. C. A. 6th Cir. Application for stay and bail presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. *Maclin P. Davis, Jr.*, for applicant. *Solicitor General Marshall* for the United States in opposition.

No. 838. WYANDOTTE TRANSPORTATION CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. (Certiorari granted, 386 U. S. 906.) Motion to remove case from summary calendar denied. *Lucian Y. Ray* for Wyandotte Transportation Co., *George B. Matthews* for Union Barge Line Corp., and *John W. Sims* for Cargill, Inc., et al. on the motion.

No. 1188, Misc. O'BRIEN *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 952. PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. *v.* ANDERSON, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. (Certiorari granted, 387 U. S. 929.) Motion to dispense with printing record granted. *Irwin L. Langbein* for petitioner on the motion.

No. 31, Original. UTAH *v.* UNITED STATES.

IT IS ORDERED that the Honorable J. Cullen Ganey, Senior Judge of the United States Court of Appeals for the Third Circuit be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to submit such reports as he may deem appropriate.

The master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

[For earlier order herein, see 387 U. S. 902.]

No. 32, Misc. TETTAMBLE *v.* MISSOURI, 386 U. S. 265. Motion of petitioner for further relief denied.

No. 817, Misc. SLIVA *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied.

No. 1767, Misc. WALKER *v.* MAXWELL, WARDEN, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 1824, Misc. HERD *v.* MICHIGAN. Motion for leave to file petition for writ of habeas corpus and other relief denied. Petitioner *pro se*. *Frank J. Kelley*, Attorney General of Michigan, and *Robert A. Derengoski*, Solicitor General, for respondent.

No. 38. MARCHETTI *v.* UNITED STATES. C. A. 2d Cir. (Certiorari granted, 385 U. S. 1000.) The case is restored to the docket for reargument at the 1967 Term. In their briefs and oral arguments, counsel are requested to discuss, in addition to the questions specified in the original writ, the following:

(1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States*, 335 U. S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U. S. C. §§ 4411, 4412?

(2) Can an obligation to pay the special occupational tax required by 26 U. S. C. § 4411 be satisfied without filing the registration statement provided for by 26 U. S. C. § 4412?

No. 1783, Misc. BUDER *v.* KROPP, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari denied.

No. 1766, Misc. MCKINNEY *v.* WILSON, WARDEN, ET AL.;

No. 1768, Misc. JADWIN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR; and

No. 1784, Misc. BROOKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1753, Misc. ALI, AKA CLAY, ET AL. *v.* CONNALLY ET AL., U. S. DISTRICT JUDGES. D. C. S. D. Tex. Motion for leave to file petition for writ of prohibition denied. *Hayden C. Covington* on the motion. *Solicitor General Marshall* for the United States in opposition.

No. 1517, Misc. O'BRYAN *v.* CHANDLER, U. S. DISTRICT JUDGE. Motion to dispense with printing petition granted. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *Harvey L. Davis* on the motions. *Carl L. Shipley* for respondent.

No. 181. GROSSO *v.* UNITED STATES. C. A. 3d Cir. (Certiorari granted, 385 U. S. 810.) The case is restored to the docket for reargument at the 1967 Term. In their briefs and oral arguments, counsel are requested to discuss, in addition to the questions previously presented, the following:

(1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States,* 335 U. S. 1, to the validity under the Fifth Amendment of the obligation to pay the wagering excise tax imposed by 26 U. S. C. § 4401?

(2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 U. S. C. § 4401 conditioned upon the filing of a return required under 26 U. S. C. § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the payment of a wagering excise tax obligation in order to extinguish the taxpayer's liability for that obligation?

Probable Jurisdiction Noted.

No. 1022. GINSBERG *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 2d Jud. Dept. Probable jurisdiction noted and case set for oral argument immediately following Nos. 1109 and 1155. *Emanuel Redfield* for appellant. *William Cahn* for appellee.

No. 1259. UNITED STATES *v.* THIRD NATIONAL BANK IN NASHVILLE ET AL. Appeal from D. C. M. D. Tenn. Probable jurisdiction noted. MR. JUSTICE FORTAS took no part in the consideration or decision of this case. *Solicitor General Marshall, Assistant Attorney General Turner* and *Richard A. Posner* for the United States. *Paul A. Porter, Dennis G. Lyons, E. William Henry* and *Frank M. Farris, Jr.*, for Third National Bank in Nashville et al., and *Robert Bloom, Joseph J. O'Malley* and *Charles H. McEnerney, Jr.*, for Camp, appellees. Reported below: 260 F. Supp. 869.

Certiorari Granted. (See also No. 2, *ante*, p. 440; No. 7, *ante*, p. 441; No. 10, *ante*, p. 442; No. 21, *ante*, p. 443; No. 26, *ante*, p. 444; No. 72, *ante*, p. 446; No. 149, *ante*, p. 447; No. 227, *ante*, p. 448; No. 323, *ante*, p. 449; No. 366, *ante*, p. 450; No. 865, *ante*, p. 452; No. 896, *ante*, p. 453; No. 1164, *ante*, p. 456; No. 1335, *ante*, p. 459; No. 79, Misc., *ante*, p. 461; No. 934, Misc., *ante*, p. 462; No. 1107, Misc., *ante*, p. 463; No. 1342, Misc., *ante*, p. 465; and No. 1421, Misc., *ante*, p. 466.)

No. 958. AVERY *v.* MIDLAND COUNTY ET AL. Sup. Ct. Tex. Certiorari granted. *Lyndon L. Olson* for petitioner. *Reagan H. Legg* for respondent Midland County, and *W. B. Browder* for respondents Brooks et al. Briefs of *amici curiae* were filed by *Solicitor General Marshall* for the United States, and by *Louis J. Lefkowitz*, Attorney General of New York, *pro se*. Reported below: 406 S. W. 422.

No. 1334. UNITED STATES *v.* CORRELL ET UX. C. A. 6th Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Rogovin, Jack S. Levin* and *Gilbert E. Andrews* for the United States. *Carl A. Swafford* for respondents. Reported below: 369 F. 2d 87.

No. 1087. SIMMONS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *George F. Callaghan* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 371 F. 2d 296.

No. 1274. CONTINENTAL OIL CO. ET AL. *v.* FEDERAL POWER COMMISSION;

No. 1287. SUPERIOR OIL CO. *v.* FEDERAL POWER COMMISSION;

No. 1291. NEW MEXICO ET AL. *v.* FEDERAL POWER COMMISSION;

No. 1292. SUN OIL CO. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 1293. CALIFORNIA ET AL. *v.* SKELLY OIL CO. ET AL.;

No. 1294. HUNT OIL CO. ET AL. *v.* FEDERAL POWER COMMISSION;

No. 1295. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* SKELLY OIL CO. ET AL.;

No. 1302. BASS ET AL. *v.* FEDERAL POWER COMMISSION;

No. 1342. FEDERAL POWER COMMISSION *v.* SKELLY OIL CO. ET AL.; and

No. 1412. CITY OF LOS ANGELES *v.* SKELLY OIL CO. ET AL. C. A. 10th Cir. These cases will hereafter be referred to collectively as the "Permian Basin Area Rate Cases."

Motions to supplement petitions in Nos. 1293 and 1295 granted. Petitions for writs of certiorari granted and cases consolidated for oral argument, eight hours being assigned for the hearing of these cases and any other cases which may be granted with respect to the "Permian Basin Area Rate Cases." Such time is to be divided among the parties, with four hours allotted to those supporting the order of the Federal Power Commission and four hours to those attacking such order, the division of time among

counsel on each side to be settled among themselves. Briefs of those parties supporting the order of the Federal Power Commission shall be filed on or before August 25, 1967, and of those attacking such order shall be filed on or before October 9, 1967.

Bruce R. Merrill, Joseph C. Johnson and *Thomas H. Burton* for Continental Oil Co., and *Cecil N. Cook* for Midhurst Oil Corp., petitioners in No. 1274.

Murray Christian and *H. W. Varner* for petitioner in No. 1287.

Crawford C. Martin, Attorney General, *George M. Cowden,* First Assistant Attorney General, *Houghton Brownlee, Jr., Linward Shivers* and *C. Daniel Jones, Jr.,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for the State of Texas; and *Boston E. Witt,* Attorney General, and *William J. Cooley,* Special Assistant Attorney General, for the State of New Mexico, petitioners in No. 1291.

Robert E. May and *Louis Flax* for petitioner in No. 1292.

Mary Moran Pajalich and *J. Calvin Simpson* for petitioners in No. 1293.

Paul W. Hicks, Robert W. Henderson and *Donald K. Young* for petitioners in No. 1294.

Frederick T. Searls for petitioner Pacific Gas & Electric Co., and *John Ormasa* for petitioners Pacific Lighting Service & Supply Co. et al. in No. 1295.

J. Evans Attwell and *W. H. Drushel, Jr.,* for petitioners in No. 1302, and for respondents Bass et al. in Nos. 1293 and 1342.

Solicitor General Marshall, Ralph S. Spritzer, Richard A. Posner, Richard A. Solomon and *Peter H. Schiff* for petitioner in No. 1342.

Roger Arnebergh for petitioner in No. 1412.

Oliver L. Stone and *Thomas G. Johnson* for Shell Oil Co.; *Warren M. Sparks* and *Donald R. Arnett* for Gulf

Oil Corp., et al.; *Kenneth Heady* and *John R. Rebman* for Phillips Petroleum Co.; *Joseph W. Morris* and *Edwin S. Nail* for Amerada Petroleum Corp.; *Homer E. McEwen, Jr.*, for Sunray DX Oil Co.; *Charles E. McGee* and *John T. Ketcham* for Sinclair Oil & Gas Co.; and *Francis R. Kirkham* and *Justin R. Wolf* for Standard Oil Co. of Texas, certain respondents in Nos. 1293, 1295, 1342 and 1412.

William K. Tell, Jr., for Texaco Inc.; *J. P. Hammond, T. C. McCorkle, William H. Emerson* and *Carroll L. Gilliam* for Pan American Petroleum Corp.; *Carroll L. Gilliam* for Mobil Oil Corp. et al.; *Hawley C. Kerr* and *Sherman S. Poland* for Skelly Oil Co.; *Clayton L. Orn, Joseph F. Diver* and *Jack Fariss* for Marathon Oil Co.; *Martin Erck* and *Bernard A. Foster, Jr.*, for Humble Oil & Refining Co.; *Stuart J. Scott* and *Bernard A. Foster, Jr.*, for Atlantic Richfield Co.; *Graydon D. Luthey* for Cities Service Oil Co. et al.; *Jerome M. Alper* for Reef Corp.; *Oscar J. Cadwallader, Jr.*, for Tidewater Oil Co.; *Richard F. Remmers* for Sohio Petroleum Co.; and *Bernard A. Foster, Jr.*, and *James D. McKinney, Jr.*, for Dorchester Gas Producing Co. et al., certain respondents in Nos. 1293, 1295 and 1342. Reported below: 375 F. 2d 6.

[For earlier order in No. 1342, see 387 U. S. 902.]

No. 1474, Misc. HAYNES *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 181. *Charles Alan Wright* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 372 F. 2d 651.

No. 1562, Misc. BIGGERS *v.* TENNESSEE. Sup. Ct. Tenn. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 1087. *Jack Greenberg, Michael Meltsner, Anthony G. Amsterdam, Avon N. Williams* and *Z. Alexander Looby* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Robert F. Hedgepath,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 411 S. W. 2d 696.

No. 1168. VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. *Walter Herzfeld, Cecilia H. Goetz, Richard A. Whiting, Robert J. Corber* and *Stanley J. Madden* for petitioner. *Robert N. Katz* and *Walter H. Mayo III* for Federal Maritime Commission, and *Solicitor General Marshall* and *Assistant Attorney General Turner* for the United States, respondents. *Edward D. Ransom* and *R. Frederic Fisher* for Pacific Maritime Association, intervenor below. Reported below: 125 U. S. App. D. C. 282, 371 F. 2d 747.

Certiorari Denied. (See also No. 807, *ante,* p. 451; No. 808, *ante,* p. 451; No. 1399, *ante,* p. 460; No. 836, Misc., *ante,* p. 461; No. 880, Misc., *ante,* p. 460; and Misc. Nos. 817 and 1783, *supra.*)

No. 522. PAULING *v.* GLOBE-DEMOCRAT PUBLISHING CO. C. A. 8th Cir. Certiorari denied. *John Raeburn Green* and *Lewis C. Green* for petitioner. *Lon Hocker* for respondent. Reported below: 362 F. 2d 188.

No. 1312. WARN *v.* BROOKS-SCANLON, INC. C. A. 9th Cir. Certiorari denied. *Marvin S. Nepom* for petitioner.

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No. 1202. GWIN ET AL., DBA MOBILE SUPPLY CO. *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 5th Cir. Certiorari denied. *George E. Stone, Jr.*, and *George F. Wood* for petitioners. *Thomas E. Twitty, Jr.*, for respondent. Reported below: 370 F. 2d 297.

No. 1297. BOWERS *v.* KAISER STEEL CORP. Sup. Ct. Alaska. Certiorari denied. *Edgar Paul Boyko* for petitioner. *George V. Powell* for respondent. Reported below: 422 P. 2d 848.

No. 1316. AMES ET AL., ADMINISTRATORS *v.* IRVINE CO. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Manuel Ruiz* for petitioners. *William L. Anderson* for respondent. Reported below: 246 Cal. App. 2d 832, 55 Cal. Rptr. 180.

No. 1319. BROOKS *v.* HUNTER ET AL. C. A. D. C. Cir. Certiorari denied. *Homer Brooks*, petitioner, *pro se*. *F. Joseph Donohue* for respondents.

No. 1323. CONTINENTAL OIL CO. ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Bruce R. Merrill, Joseph C. Johnson* and *Thomas H. Burton* for petitioner Continental Oil Co., *Henry B. Weaver, Jr., Stuart J. Scott* and *Bernard A. Foster, Jr.*, for petitioner Atlantic Richfield Co., and *Edmund D. Buckley* for petitioner Tidewater Oil Co. Reported below: 370 F. 2d 57.

No. 1325. GROSSMAN ET AL. *v.* STUBBS ET AL. Super. Ct. N. J. Certiorari denied.

No. 1435. GULF OIL CORP. ET AL. *v.* WOLOWITZ. C. A. D. C. Cir. Certiorari denied. *Henry T. Rathbun* for petitioners. *William D. Hall* and *Elliott I. Pollock* for respondent.

No. 1329. BALLOU ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Alan R. Vogeler* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Carolyn R. Just* for the United States. Reported below: 370 F. 2d 659.

No. 1331. HOLLAND AMERICAN LINE *v.* PHILADELPHIA CEILING & STEVEDORING CO. C. A. 3d Cir. Certiorari denied. *T. E. Byrne, Jr.*, for petitioner. *William J. O'Brien* and *Victor L. Drexel* for respondent. Reported below: 374 F. 2d 189.

No. 1332. NATIONAL MOLASSES CO. *v.* BEEBE, ADMINISTRATOR, ET AL. C. A. 3d Cir. Certiorari denied. *Thomas Byrne, Jr.*, and *Mark D. Alspach* for petitioner. *Gordon W. Gerber* for respondent Beebe. Reported below: 373 F. 2d 886.

No. 1336. WILLIAMS *v.* TEXAS FARM PRODUCTS CO. Ct. Civ. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. *William L. Garwood, Robert J. Hearon, Jr.*, and *Benton Musslewhite* for petitioner. *Charles R. Cravens, Jr.*, for respondent. Reported below: 406 S. W. 2d 256.

No. 1350. BOSSIER PARISH SCHOOL BOARD ET AL. *v.* LEMON ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion*, Attorney General of Louisiana, and *William P. Schuler*, Assistant Attorney General, for petitioners. Reported below: 370 F. 2d 847.

No. 1376. MORIARTY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Marshall J. Seidman* and *John J. Duffy* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 375 F. 2d 901.

No. 616. WENZLER *v.* PITCHESS, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would reverse on the basis of *Redrup* v. *New York*, 386 U. S. 767. *Stanley Fleishman* for petitioner. *Byron B. Gentry* for respondents. Reported below: 359 F. 2d 402.

No. 1216. ALLYN *v.* FLANNERY ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Thomas R. Mulroy* and *Edward W. Rothe* for petitioner. Reported below: 75 Ill. App. 2d 365, 221 N. E. 2d 89.

No. 1015. IN RE T. W. P. Sup. Ct. Fla. and/or Ct. App. Fla., 3d Dist. Petition for writ of certiorari denied upon representation of the Attorney General of Florida that the case is moot. *Tobias Simon* and *Alfred I. Hopkins* for petitioner. *Earl Faircloth*, Attorney General, for the State of Florida. Reported below: 192 So. 2d 482; 184 So. 2d 507.

No. 1276. RE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion to remand and certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion and petition. *Daniel H. Greenberg* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 641.

No. 1003, Misc. JUAREZ *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, *S. Clark Moore*, Deputy Attorney General, for respondent. Reported below: 243 Cal. App. 2d 475, 52 Cal. Rptr. 556.

No. 931. AIELLO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joseph S. Accardi* for petitioner. Reported below: 91 N. J. Super. 457, 221 A. 2d 40.

No. 1321. GRISWOLD *v.* ARIZONA. Sup. Ct. Ariz. Motion to dispense with printing response granted. Certiorari denied. *John P. Frank* for petitioner. *Darrell F. Smith*, Attorney General of Arizona, for respondent. Reported below: 101 Ariz. 577, 422 P. 2d 693.

No. 1339. SPEVACK *v.* PIKE. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Carleton U. Edwards II* for petitioner. *Francis D. Thomas, Jr.*, for respondent.

No. 270, Misc. BOYER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 385, Misc. SMITH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 63 Cal. 2d 779, 409 P. 2d 222.

No. 583, Misc. GRAY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Benjamin W. Boley* and *Ralph J. Moore, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Robert S. Erdahl* and *Kirby W. Patterson* for the United States.

No. 1328, Misc. KELLY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *William W. Greenhalgh* and *James F. Bromley* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 125 U. S. App. D. C. 205, 370 F. 2d 227.

No. 781, Misc. DANIEL *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 946, Misc. PRITCHETT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 1013, Misc. BONEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1111, Misc. KEETON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 280 Ala. 140, 190 So. 2d 694.

No. 1322, Misc. GOMEZ *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Raymond M. Momboisse* and *Daniel J. Kremer*, Deputy Attorneys General, for respondent.

No. 1337, Misc. THOMPSON *v.* THOMPSON ET AL. C. A. 3d Cir. Certiorari denied. *Jerome L. Markovitz* for petitioner. *Morris M. Wexler* for respondents. Reported below: 368 F. 2d 791.

No. 1370, Misc. FOSTER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *David Kaplan* for petitioner. *Robert Matthews*, Attorney General of Kentucky, and *Harold T. Hotopp*, Assistant Attorney General, for respondent. Reported below: 415 S. W. 2d 373.

No. 1371, Misc. OWEN ET AL. *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Petitioners *pro se*. *Darrell F. Smith*, Attorney General of Arizona, and *Carl Waag*, Assistant Attorney General, for respondent. Reported below: 101 Ariz. 156, 416 P. 2d 589.

No. 1403, Misc. TOVAR *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 368 F. 2d 1006.

No. 1434, Misc. HOWARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 372 F. 2d 294.

No. 1464, Misc. CASTLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1612, Misc. BROWN *v.* UNITED STATES; and

No. 1627, Misc. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *M. Michael Cramer* and *H. Thomas Sisk* for petitioner in No. 1612, Misc., and *Jean F. Dwyer* for petitioner in No. 1627, Misc. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States in both cases. Reported below: 126 U. S. App. D. C. 134, 375 F. 2d 310.

No. 1465, Misc. WALSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Paul A. Renne* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 371 F. 2d 135.

No. 1466, Misc. LUGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 370 F. 2d 992.

No. 1485, Misc. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 371 F. 2d 824.

No. 1498, Misc. BARBOUR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Sidney Ginsberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 666.

No. 1532, Misc. CALLAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 371 F. 2d 295.

No. 1554, Misc. MONROE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 1583, Misc. LEVINE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George L. Saunders, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 372 F. 2d 70.

No. 1555, Misc. WILLIAMS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Petitioner *pro se*. *John J. Dillon*, Attorney General of Indiana, and *Douglas B. McFadden*, Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 222 N. E. 2d 397.

No. 1576, Misc. LLANES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 374 F. 2d 712.

No. 1595, Misc. HELICZER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 373 F. 2d 241.

No. 1626, Misc. POWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 386.

No. 1635, Misc. WALKER *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. *James R. Walker, Jr.*, *pro se*, and *Samuel S. Mitchell* and *Romallus O. Murphy* for petitioner. *Thomas Wade Bruton*, Attorney General, for respondent State of North Carolina. Reported below: 372 F. 2d 129.

No. 1637, Misc. SIRES *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari denied.

No. 1641, Misc. WHITE *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied.

No. 1638, Misc. DOHERTY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 36 Ill. 2d 286, 222 N. E. 2d 501.

No. 1645, Misc. SNOW *v.* RODRIGUEZ, ACTING WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1647, Misc. SOBOTA *v.* RODRIGUEZ, ACTING WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 371 F. 2d 909.

No. 1648, Misc. NEWSOM *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. Reported below: 207 Va. 844, 153 S. E. 2d 235.

No. 1649, Misc. SHORTS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1650, Misc. BANDY *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for respondent.

No. 1651, Misc. LATTIMORE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1657, Misc. IN RE WILLIAMS. Sup. Ct. N. C. Certiorari denied. *Samuel S. Mitchell, Romallus O. Murphy* and *Herman L. Taylor* for petitioner. *T. W. Bruton,* Attorney General, and *Andrew A. Vanore, Jr.,* for State of North Carolina. Reported below: 269 N. C. 68, 152 S. E. 2d 317.

No. 1659, Misc. DAVIS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 1660, Misc. PINA ET AL. *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 1661, Misc. ZACHERY *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 1662, Misc. WILSON *v.* RANDOLPH, DIRECTOR OF PUBLIC SAFETY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 1668, Misc. WILLIAMS, ADMINISTRATOR *v.* LOUISVILLE & NASHVILLE RAILROAD CO. C. A. 6th Cir. Certiorari denied. *John S. Wrinkle* for petitioner. *W. D. Spears* for respondent. Reported below: 371 F. 2d 125.

No. 1669, Misc. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1673, Misc. SMITH *v.* IDAHO ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Allan G. Shepard*, Attorney General of Idaho, and *John S. Simko*, Assistant Attorney General, for respondents. Reported below: 373 F. 2d 149.

No. 1675, Misc. WRIGHT *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. *Michael A. Williams* for petitioner.

No. 1681, Misc. DURGIN ET AL. *v.* GRAHAM ET AL. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Tom Fairfield Brown* for respondent Lindsay Newspapers, Inc. Reported below: 372 F. 2d 130.

No. 1682, Misc. DE WELLES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 372 F. 2d 67.

No. 1696, Misc. KOEBRICH *v.* OLIVER, WARDEN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1683, Misc. BROECKEL ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *James R. Willis* for petitioners. *John T. Corrigan* and *Charles W. Fleming* for respondent. Reported below: 8 Ohio App. 2d 330, 222 N. E. 2d 443.

No. 1690, Misc. HIVES *v.* TITTLE. Ct. App. Ohio, Franklin County. Certiorari denied. *Ishmael C. Childs* for petitioner.

No. 1700, Misc. NITTI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Terence F. MacCarthy* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 374 F. 2d 750.

No. 1701, Misc. BALLINGER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 36 Ill. 2d 620, 225 N. E. 2d 10.

No. 1711, Misc. DAYEN *v.* CALIFORNIA. Super. Ct. Cal., County of L. A. Certiorari denied.

No. 1716, Misc. BOURLAND *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1718, Misc. LANDMAN *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. *Robert A. Cox, Jr.*, for petitioner. Reported below: 370 F. 2d 135.

No. 1722, Misc. WIMBERLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1749, Misc. MCCLOSKEY *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. App. Md. Certiorari denied. Reported below: 245 Md. 497, 226 A. 2d 534.

No. 1727, Misc. SCHNEIDER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioner. Reported below: 375 F. 2d 446.

No. 1732, Misc. GALLARDO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1740, Misc. KING *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1742, Misc. LADD *v.* SUPERIOR COURT OF THE COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1748, Misc. BRYANT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1782, Misc. SCHACK *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

The following petitions for writs of certiorari are denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 677, Misc. AGUILAR *v.* UNITED STATES. C. A. 9th Cir. *James M. Hall* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 363 F. 2d 379.

No. 798, Misc. TAYLOR *v.* TENNESSEE. Sup. Ct. Tenn. Petitioner *pro se*. *George F. McCanless*, Attorney General of Tennessee, and *Robert F. Hedgepath*, Assistant Attorney General, for respondent.

No. 842, Misc. EARL *v.* UNITED STATES. C. A. D. C. Cir. *James E. Hogan* for petitioner. *Solicitor General*

Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Sidney M. Glazer* for the United States. Reported below: 124 U. S. App. D. C. 77, 361 F. 2d 531; 124 U. S. App. D. C. 273, 364 F. 2d 666.

No. 944, Misc. MOTTRAM *v.* ROBBINS, WARDEN. C. A. 1st Cir. Petitioner *pro se. James S. Erwin,* Attorney General of Maine, and *John W. Benoit,* Assistant Attorney General, for respondent.

No. 1007, Misc. STUBBS *v.* CROUSE, WARDEN. C. A. 10th Cir. Petitioner *pro se. Robert C. Londerholm,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent. Reported below: 366 F. 2d 753.

No. 1011, Misc. GILBERT *v.* UNITED STATES. C. A. 9th Cir. *James F. Kirkham* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 366 F. 2d 923.

No. 1015, Misc. WINGFIELD *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Petitioner *pro se. Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 1117, Misc. POSLEY *v.* ILLINOIS. Sup. Ct. Ill. *Gerald W. Getty* and *James J. Doherty* for petitioner. *William G. Clark,* Attorney General of Illinois, for respondent.

No. 1194, Misc. FERGUSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Petitioners *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 369 F. 2d 944.

No. 1195, Misc. LABLANC *v.* COLORADO. Sup. Ct. Colo. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *Robert C. Miller,* Assistant Attorney Gen-

eral, for respondent. Reported below: — Colo. —, 418 P. 2d 888.

No. 1219, Misc. HATCH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Reported below: 25 App. Div. 2d 947, 270 N. Y. S. 2d 478.

No. 1229, Misc. HERRING *v.* NEW MEXICO. Sup. Ct. N. M. Reported below: 77 N. M. 232, 421 P. 2d 767.

No. 1254, Misc. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent. Reported below: 36 Ill. 2d 194, 222 N. E. 2d 321.

No. 1281, Misc. MONROE *v.* MICHIGAN. Sup. Ct. Mich. Petitioner *pro se*. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Curtis G. Beck*, Assistant Attorney General, for respondent.

No. 1285, Misc. BONNER *v.* MINNESOTA. Sup. Ct. Minn. Petitioner *pro se*. *Douglas M. Head*, Attorney General of Minnesota, and *Gerard W. Snell*, Acting Solicitor General, for respondent. Reported below: 275 Minn. 280, 146 N. W. 2d 770.

No. 1633, Misc. LUXEM *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist.

No. 1674, Misc. HENSLEY ET AL. *v.* UNITED STATES. C. A. 6th Cir. *I. Philip Sipser*, *Paul O'Dwyer* and *Dan Jack Combs* for petitioners. *Solicitor General Marshall*, *Assistant Attorney General Vinson*, *Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 374 F. 2d 341.

No. 1709, Misc. TALBOT *v.* CALIFORNIA. Sup. Ct. Cal.

No. 1743, Misc. JOHNSON *v.* LOUISIANA. Sup. Ct. La. *Benjamin E. Smith* for petitioner. Reported below: 249 La. 950, 192 So. 2d 135.

No. 1747, Misc. RHETTA *v.* FIELD, MENS COLONY SUPERINTENDENT. Ct. App. Cal., 2d App. Dist.

No. 514, Misc. POTTER ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Motion for leave to supplement petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William A. Dougherty* for petitioners. *Thomas C. Lynch,* Attorney General, *William E. James,* Assistant Attorney General, and *James H. Kline,* Deputy Attorney General, for respondent. Reported below: See 240 Cal. App. 2d 621, 49 Cal. Rptr. 892.

Rehearing Denied.

No. 888, October Term, 1965. UNITED BISCUIT CO. OF AMERICA *v.* FEDERAL TRADE COMMISSION, 383 U. S. 926;

No. 16. AUSTIN *v.* KENTUCKY, 386 U. S. 767;

No. 98. ANDERS *v.* CALIFORNIA, 386 U. S. 738;

No. 500. FENIX & SCISSON, INC. *v.* UNITED STATES, 386 U. S. 1036;

No. 768. SULLIVAN ET UX. *v.* UNITED STATES, 387 U. S. 905;

No. 915. MUNCY ET VIR *v.* GENERAL MOTORS CORP., 386 U. S. 1037;

No. 1011. ARMORED CARRIER CORP. *v.* UNITED STATES ET AL., 386 U. S. 778;

No. 1143. MADISON *v.* UNITED STATES, 386 U. S. 1037;

No. 1165. CALHOUN *v.* HERTWIG, TRUSTEE, ET AL., 386 U. S. 1033;

No. 1166. JORDAN ET AL. *v.* UNITED STATES, 386 U. S. 1033;

No. 1178. MUTH, ADMINISTRATRIX, ET AL. *v.* ATLASS ET AL., 386 U. S. 1037;

No. 1258. POWELL *v.* COMMITTEE ON ADMISSIONS AND GRIEVANCES ET AL., 386 U. S. 1035; and

No. 1217, Misc. FORREST *v.* UNITED STATES, 386 U. S. 995. Petitions for rehearing denied.

No. 1324, Misc. OPPENHEIM ET AL. *v.* STERLING ET AL., 386 U. S. 1011;

No. 1411, Misc. LIPKA, ADMINISTRATRIX, ET AL. *v.* UNITED STATES ET AL., 387 U. S. 935;

No. 1597, Misc. BLANCHARD, DBA INFERNO CO. *v.* TEXSTEAM CORP. ET AL., 387 U. S. 936; and

No. 1623, Misc. BRYANS *v.* UNITED STATES, 387 U. S. 903. Petitions for rehearing denied.

No. 665. KLEIN *v.* KLEIN, 385 U. S. 973, 1032. Motion for leave to file second petition for rehearing denied.

No. 801, Misc., October Term, 1965. CORCORAN *v.* YORTY ET AL., see, *e. g.*, 384 U. S. 982. Motion for leave to file fourth petition for rehearing denied.

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REVISED RULES

OF THE

SUPREME COURT OF THE UNITED STATES

Effective October 2, 1967

The following revision of the Rules of the Supreme Court of the United States was adopted by an order of the Court entered June 12, 1967. See *post*, p. 929. The revised Rules became effective on October 2, 1967, as provided in Rule 62, *post*, p. 991.

For the next previous revision of the Rules of the Supreme Court see 346 U. S. 949, and for amendments thereto see 349 U. S. 973, 363 U. S. 859, 366 U. S. 979, 368 U. S. 803, and 373 U. S. 955.

ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 12, 1967.

The revision of the Rules of this Court has been lodged with the Clerk, and it is ordered that the said Rules shall become effective October 2, 1967, and be printed as an appendix to the United States Reports.

It is further ordered that the Rules promulgated April 12, 1954, appearing in volume 346 of the United States Reports and all amendments thereof be, and they hereby are rescinded, but this shall not affect any proper action taken under them before the Rules hereby adopted become effective.

REVISED RULES
OF THE
SUPREME COURT OF THE UNITED STATES

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REVISED RULES

OF THE

SUPREME COURT OF THE UNITED STATES.

ADOPTED JUNE 12, 1967, EFFECTIVE OCTOBER 2, 1967.

PART I. THE COURT.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice as attorney or counsellor in any court, while he continues in office.

2. The clerk shall not permit any original or certified record or paper to be taken from the office, except temporarily for purposes of printing, and except, on proper application from counsel or from the clerk or the presiding judge of a court below whose judgment is sought to be reviewed, for return to such court, after the conclusion of the proceedings in this court. Original or file copies of pleadings, papers, or briefs may not be withdrawn by litigants.

3. The clerk's office will be open from 9:00 A.M. to 5:00 P.M. Mondays through Fridays, and from 9:00 A.M. to noon on Saturdays, legal holidays excepted.

2.

LIBRARY.

1. The library for the bar shall be open to members of the bar of this court, to members of Congress, and to law officers of the executive or other departments of the Government.

2. The library shall be open during such times as the reasonable needs of the bar require and shall be gov-

erned by the regulations made by the librarian with the approval of the chief justice.

3. Books may not be removed from the building.

3.

TERM.

1. The court will hold an annual term commencing on the first Monday in October of each year and may hold such adjourned or special terms as may be necessary.

2. The court will at every term announce the date after which no case will be called for argument, or be submitted for decision at that term, unless otherwise ordered for special cause shown.

3. At the end of each term, all cases on the docket shall be continued to the next term.

4.

SESSIONS, QUORUM, AND ADJOURNMENTS.

1. Open sessions of the court will be held at ten a. m. on the first Monday in October of each year, and thereafter as announced by the court. When the court is in session to hear arguments, it sits from ten until noon; recesses until half-past twelve; and adjourns for the day at half-past two.

2. Unless otherwise ordered the court will not schedule arguments on Fridays or Saturdays.

3. In the absence of a quorum, on any day appointed for holding a session of the court, the justices attending (or, if no justice is present, the clerk or a deputy clerk) may adjourn the court until there is a quorum.

4. The court may, in appropriate instances, direct the clerk or the marshal to announce recesses and adjournments.

PART II. ATTORNEYS AND COUNSELLORS.

5.

ADMISSION TO THE BAR.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest court of a State, Territory, District, Commonwealth, or Possession, and that their private and professional characters shall appear to be good.

2. In advance of appearing for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court evidencing his admission to practice there and that he is presently in good standing, and (2) his personal statement, on the form approved by the court and furnished by the clerk, which shall be indorsed by two members of the bar of this court who are not related to the applicant.

3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he is satisfied that the applicant possesses the necessary qualifications.

4. Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz.:

I, ..., do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

See Rule 52 (d) for fee required.

6.

ADMISSION OF FOREIGN COUNSEL.

An attorney, barrister, or advocate who is qualified to practice in the courts of any foreign state may be specially admitted to the bar of this court for purposes limited to a particular case. He shall not, however, be

authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admissions shall be only on motion of a member of the bar of this court, notice of which signed by such member and reciting all relevant facts shall be filed with the clerk at least three days prior to the motion.

7.

CLERKS TO JUSTICES NOT TO PRACTICE.

No one serving as a law clerk or secretary to a justice of this court shall practice as an attorney or counsellor in any court or before any agency of government while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court until two years have elapsed after such separation; nor shall he ever participate, by way of any form of professional consultation and assistance, in any case that was pending in this court during the period that he held such position.

8.

DISBARMENT.

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of a majority of the justices participating.

PART III. ORIGINAL JURISDICTION.

9.

PROCEDURE IN ORIGINAL ACTIONS.

1. This rule applies only to actions within the original jurisdiction of the court under the Constitution. Original applications for writs in aid of the court's appellate jurisdiction are governed by Part VII of these rules.

2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

3. The initial pleading in any original action shall be prefaced by a motion for leave to file such pleading, and both shall be printed in conformity with Rule 39. A brief in support of the motion for leave to file, which shall comply with Rule 39, may be filed with the motion and pleading. Sixty copies of each document, with proof of service as prescribed by Rule 33, are required, except that, where the adverse party is a State, service shall be made on the governor and attorney general of such State.

4. The case will be placed upon the original docket when the motion for leave to file is filed with the clerk. The docket fee must be paid at that time, and the appearance of counsel for the plaintiff entered.

5. The adverse party or parties may, within sixty days after receipt of the motion for leave to file and allied documents, file sixty printed copies of a brief or briefs in opposition to such motion, which shall conform to Rule 39. When such brief or briefs in opposition have been filed, or the time within which they may be filed has expired, the motion, pleading and briefs shall be distributed to the court by the clerk. The court may thereafter grant or deny the motion or set it down for argument.

6. Additional pleadings may be filed, and subsequent proceedings had, as the court shall direct.

7. Any process against a State issued from the court in an original action shall be served on the governor and attorney general of such state.

8. A summons issuing out of this court in any original action shall be served on the defendant sixty days before the return day set out therein; and if the defendant, on such service of the summons, shall not respond by the return day, the plaintiff shall be at liberty to proceed *ex parte*.

PART IV. JURISDICTION ON APPEAL.

10.

APPEAL—HOW TAKEN—PARTIES.

1. An appeal permitted by law to this court shall be taken by filing a notice of appeal, in the form and at the place prescribed by this rule.

2. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the time of its entry, and shall specify the statute or statutes under which the appeal to this court is taken. A copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 33, and proof of such service shall be filed with the notice of appeal.

3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of such court. If the appeal is taken from a state court, the notice of appeal shall be filed with the clerk of the court possessed of the record.

4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this court, unless the appellant shall notify the clerk of this court in writing of his belief that

one or more of the parties below have no interest in the outcome of the appeal. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the appeal. All parties other than the appellant shall be appellees, but appellees who support the position of the appellant shall meet the time schedule for filing papers which is provided for the appellant, except that any response by such appellees to a jurisdictional statement shall be filed as promptly as possible after receipt of the jurisdictional statement.

11.

APPEAL—TIME FOR TAKING.

1. An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment.

2. An appeal permitted by law from a district court to this court in a criminal case shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the district court within thirty days after entry of the judgment or order appealed from.

3. An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal.

12.

DESIGNATION AND CERTIFICATION OF RECORD.

1. A party intending to appeal shall request the clerk of the court possessed of the record to certify it and to provide for its transmission to this court. The entire record in the court from which the appeal is taken shall be transmitted unless the appellant notifies the clerk of

that court that all the parties agree that specified parts may be omitted as unnecessary for the determination of the appeal. The request to transmit the record may be made prior to filing a notice of appeal and shall be made in time to permit the preparation, certification and transmission of the record for filing in this court within the time provided by paragraph 1 of Rule 13 for docketing the appeal. A copy of the request shall be sent to all parties to the proceeding.

2. The clerk of the court possessed of the record shall include in the record the opinion and judgment sought to be reviewed and the notice of appeal. Such clerk shall number the documents comprising the record and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness.

3. Whenever it shall be necessary or proper, in the opinion of the presiding judge of the court from which the appeal is taken, that original papers of any kind should be inspected in this court in lieu of copies, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper.

4. When more than one appeal is taken to this court from the same judgment, it shall be sufficient to prepare a single record containing all the matter designated or agreed upon by the parties, without duplication.

13.

DOCKETING CASES.

1. Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, except that in the case of appeals pursuant to Sections 1252, 1253 or 2282 of Title 28 of the United States Code the time limit for

docketing shall be sixty days from the filing of the notice of appeal. For good cause shown, a justice of this court may extend the time for docketing a case for a period not exceeding sixty days. Where application under this rule is made, paragraph 2 of Rule 34 governs timeliness. Such applications are not favored.

2. Upon the filing in this court of the record brought up by appeal, counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case will then be placed on the appellate docket.

3. It shall be the duty of the appellant to notify all appellees on a form supplied by the clerk of the date of docketing and of the docket number of the case.

14.

DISMISSING APPEALS FOR NON-PROSECUTION.

1. After a notice of appeal has been filed, but before the case has been docketed in this court, the parties may at any time dismiss the appeal by stipulation filed in the court possessed of the record, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 60.

2. If an appeal which has been noted is not docketed in this court within the time for docketing, plus any enlargement thereof duly granted, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such orders thereon with respect to costs as may be just.

3. If an appeal which has been noted is not docketed in this court within the time for docketing, plus any enlargement thereof duly granted, and the court pos-

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sessed of the record has for any reason denied an appellee's motion, made as provided in the foregoing paragraph, to dismiss the appeal, the appellee may have the cause docketed and the appeal dismissed in this court, by producing a certificate, whether in term or vacation, from the clerk of the court possessed of the record, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 35 and be accompanied by proof of service as prescribed by Rule 33. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the court will give judgment against the appellant and in favor of appellee for costs. In no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this paragraph, unless by special leave of court.

15.

JURISDICTIONAL STATEMENT.

1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (h) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

(i) The nature of the proceeding and the statute pursuant to which it is brought;

(ii) The date of the judgment or decree sought to be reviewed and the time of its entry, the date of any order respecting a rehearing, the date the notice of appeal was filed, and the court in which it was filed;

(iii) The statutory provision believed to confer on this court jurisdiction of the appeal:

(iv) Cases believed to sustain the jurisdiction.

(v) If the validity of the statute of a state, or statute or treaty of the United States is involved, its text shall be set out verbatim, citing the volume and page where it may be found in the official edition. If the statutory or treaty provisions that are involved are lengthy, the citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(c) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be repetitious. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.

(d) A concise statement of the case containing the facts material to the consideration of the questions presented. If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of

a nature to bring the case within the statutory provision believed to confer jurisdiction on this court.

(e) If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht* v. *King*, 260 U. S. 174, 176, 177), which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction (subparagraph (b)(iv) hereof), and shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(f) If the appeal is from a federal court, there shall similarly be included a statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(g) If the appeal is from a decree of a district court granting or denying an interlocutory injunction, the statement must also include a showing of the matters in which it is contended that the court has abused its discretion by such action. See *United States* v. *Corrick*, 298 U. S. 435; *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310.

(h) There shall be appended to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including, if not reported, earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree; and, if the appeal is from a federal court, there shall similarly be appended the court's findings of fact and conclusions of law, if any were separately made.

(i) If the appeal is from a state court, there shall also be appended to the statement a copy of the order, judgment, or decree appealed from; and if from a federal court, there shall similarly be appended a copy of such order, judgment, or decree, which may however be limited to the portions thereof appealed from.

2. The jurisdictional statement shall be printed in conformity with Rule 39.

3. Where several cases are appealed from the same court that involve identical or closely related questions, it shall suffice to file a single jurisdictional statement covering all the cases.

16.

MOTION TO DISMISS OR AFFIRM.

1. Within thirty days after receipt of the jurisdictional statement, unless the time is enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34, the appellee may file a printed motion to dismiss, or motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss.

(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules.

(b) The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The court will receive a motion to dismiss or affirm on any other grounds which the appellee wishes to present as reasons why the court should not set the case for argument.

2. The motion to dismiss or affirm shall be printed in conformity with Rules 35 and 39, and forty copies, with proof of service as prescribed by Rule 33, shall be filed with the clerk.

3. Upon the filing of such motion, or the expiration of the time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, shall be distributed by the clerk to the court for its consideration.

4. Briefs opposing motions to dismiss or affirm may be filed, but distribution of the jurisdictional statement and consideration thereof by this court will not be delayed pending the filing of such briefs. Forty copies of such briefs prepared in accordance with Rule 39 and served as prescribed by Rule 33 shall be filed.

5. Any party may file a supplemental brief at any time while a jurisdictional statement is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

6. After consideration of the papers distributed pursuant to this rule, the court will enter an appropriate order. If such order notes probable jurisdiction, or postpones consideration of the question of jurisdiction to the hearing of the case on the merits, the case shall stand for argument. If consideration of the question of jurisdiction is postponed, counsel should address themselves, at the outset of their briefs and oral argument, to the question of jurisdiction.

17.

USE OF SINGLE APPENDIX.

After the court has noted or postponed jurisdiction any portion of the record to which the parties wish to

direct the court's particular attention shall be printed in a single appendix prepared by the appellant under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

18.

SUPERSEDEAS ON APPEAL.

1. Whenever an appellant entitled thereto desires a stay on appeal, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or, subject to paragraph 2 hereof, to a justice of this court, a motion to stay the enforcement of the judgment appealed from, with which, if the stay is to act as a supersedeas, shall be tendered a supersedeas bond which shall have such surety or sureties as said judge, court, or justice may require. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as this court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the judge, court, or justice after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of any court wherein were had the proceed-

ings appealed from, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

2. Application hereunder to a justice of this court will normally not be entertained unless application therefor has first been made to a judge of the court rendering the decision appealed from, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51.

PART V. JURISDICTION ON WRIT OF CERTIORARI.

19.

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceed-

ings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

20.

CERTIORARI TO A COURT OF APPEALS BEFORE JUDGMENT.

A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States* v. *United Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579.

21.

REVIEW ON CERTIORARI—HOW SOUGHT—PARTIES.

1. Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition, which shall conform in all respects to Rule 23, and a transcript of the record in the case, including the proceedings in the court whose judgment or decree is sought to be reviewed, which shall be certified by the clerk of the appropriate court or courts below. The entire record in the court to which certiorari is addressed shall be filed unless the parties agree that specified parts may be omitted as unnecessary for the determination of the peti-

tion or of the writ, if it be granted. The provisions of Rule 12 (4) with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari. Service of a copy of the transcript of the record is not required.

2. Upon the filing of the petition and the certified transcript of record required by the preceding paragraph, counsel for the petitioner shall enter his appearance and pay the docket fee. The case will then be placed on the appellate docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 33.

3. A party seeking a cross-writ of certiorari to review in this court the same judgment need not file any record additional to that filed by the petitioner.

4. Any respondent, including a cross-petitioner, may, within the time allowed for filing his brief in opposition or his cross-petition, file duly certified portions of the record additional to those filed by the petitioner.

5. The court may, on its own motion or that of a party, require the printing of the entire record, or of designated portions thereof, prior to ruling on the petition for writ of certiorari. If the petition is thereafter denied, the cost of such printing shall be taxed against the petitioner, unless otherwise ordered by the court; if the petition is thereafter granted, the cost of such printing shall abide the outcome of the case.

6. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, unless the petitioner shall notify the clerk of this court in writing of his belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be

served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the petition. All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers which is provided for the petitioner, except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition.

22.

REVIEW ON CERTIORARI—TIME FOR PETITIONING.

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within ninety days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days.

2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. If the original judgment in such a case was entered in a district court in Alaska, Guam, Hawaii, Puerto Rico, the Virgin Islands, or the Canal Zone, the petition and certified record shall be deemed filed in time if mailed by air-mail under a postmark dated within the thirty-day period or due extension thereof.

3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law.

4. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 23 (1), subparagraphs (b) and (f)), the grounds on which the jurisdiction of this court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. For the time and manner of presenting an application for extension of time within which to file a petition for writ of certiorari, see Rules 34, 35 (2), and 50. Such applications are not favored.

23.

THE PETITION FOR CERTIORARI.

1. The petition for writ of certiorari shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (i) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(e) A concise statement of the case containing the facts material to the consideration of the questions presented.

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be

included in an appendix to the petition, which may, if more convenient, be separately presented.

(g) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19.

(i) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented.

(j) If review of the judgment or decree of a state court is sought, there shall also be appended to the petition a copy of the judgment or decree in question; and, if review of the judgment or decree of a federal court is sought, there shall similarly be appended a copy of such judgment or decree, which may however be limited to the portions thereof sought to be reviewed.

2. The petition for writ of certiorari shall be printed in conformity with Rule 39.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready

and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases.

24.

BRIEF IN OPPOSITION—REPLY—SUPPLEMENTAL BRIEFS.

1. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34), after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. See Rule 19. Such brief in opposition shall comply with Rule 39 and with the requirements of Rule 40 governing a respondent's brief, and shall be served as prescribed by Rule 33.

2. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

3. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, and the record and brief, if any, shall be distributed by the clerk to the court for its consideration.

4. Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs.

5. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

25.

ORDER GRANTING OR DENYING CERTIORARI.

1. Whenever a petition for writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record of the granting of the petition. The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. A formal writ shall not issue unless specially directed.

2. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the court or of a justice thereof.

26.

USE OF SINGLE APPENDIX.

After certiorari has been granted any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the petitioner under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

27.

STAY PENDING REVIEW ON CERTIORARI.

Applications pursuant to 28 U. S. C. § 2101 (f) to a justice of this court will normally not be entertained unless application for a stay has first been made to a

judge of the court rendering the decision sought to be reviewed, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51.

PART VI. JURISDICTION OF CERTIFIED QUESTIONS.

28.

QUESTIONS CERTIFIED BY A COURT OF APPEALS OR BY THE COURT OF CLAIMS.

1. Where a court of appeals or the Court of Claims shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

2. If in a cause certified by a court of appeals it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up, so that it may consider and decide the entire matter in controversy.

3. Where application is made under the preceding paragraph for direction that the entire record be sent up, the application must be accompanied by a certified copy thereof.

29.

PROCEDURE IN CERTIFIED CASES.

1. When a case is certified, the certificate itself constitutes the record. The clerk will upon receipt thereof from the court below notify the appellant in the court of appeals, or the plaintiff in the Court of Claims, who shall thereupon pay the docket fee, after which the case will be placed on the appellate docket. If the appellant

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or plaintiff fails to pay the fee, the appellee or defendant may do so. The appearance of counsel for the party paying the fee shall be entered at the time of payment.

2. After docketing, the certificate shall be submitted to the court for a preliminary examination to determine whether the case shall be set for argument or whether the certificate will be dismissed.

3. Any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the appellant or plaintiff in the court below under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

4. Briefs on the merits in cases on certificates shall comply with Rules 39, 40, and 41, except that the brief of the party who was appellant or plaintiff below shall be filed within forty-five days of the order setting the case down for argument.

PART VII. JURISDICTION TO ISSUE EXTRAORDINARY WRITS.

30.

CONSIDERATIONS GOVERNING ISSUANCE OF EXTRAORDINARY WRITS.

The issuance by the court of any writ authorized by 28 U. S. C. § 1651 (a) is not a matter of right but of sound discretion sparingly exercised. See the following cases, which are cited by way of illustration only: *Ex parte Bollman and Swartwout,* 4 Cranch 75; *Ex parte Peru,* 318 U. S. 578; *Ex parte Abernathy,* 320 U. S. 219; *Ex parte Hawk,* 321 U. S. 114; *House* v. *Mayo,* 324 U. S. 42; *U. S. Alkali Export Assn.* v. *United States,* 325 U. S. 196; *De Beers Consol. Mines* v. *United States,* 325 U. S. 212; *Ex parte Betz,* 329 U. S. 672; *Ex parte Fahey,* 332 U. S. 258.

31.

PROCEDURE ON APPLICATIONS FOR EXTRAORDINARY WRITS.

1. The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U. S. C. § 1651 (a) or 28 U. S. C. § 2241 shall be prefaced by a motion for leave to file such petition, and both shall be printed. All contentions in support of the petition shall be included in the petition. The case will be placed upon the miscellaneous docket when forty copies of the printed papers, with proof of service as prescribed by Rule 33 (subject to paragraph 5 of this rule), are filed with the clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time.

2. If the petition seeks issuance of a common law writ of certiorari under 28 U. S. C. § 1651 (a), there must also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. The petition shall, except for the addition of the motion for leave to file, follow as far as may be the form for a petition for certiorari prescribed by Rule 23, and shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate processes. The respondent may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief in opposition, as provided in Rule 24.

3. If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall set forth with particularity why the relief sought is not available in any other court, and there shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition. The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 23. The motion and petition shall be served on the judge

or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief or briefs in opposition thereto, with proof of service. If the judge or judges concerned do not desire to contest the motion and petition, they may so advise the clerk and all parties by letter. All parties, other than the judge or judges, who are served pursuant to this paragraph, shall also be deemed to be respondents for all purposes in the proceeding in this court.

4. When briefs in opposition under paragraphs 2 and 3 of this rule have been filed, or when the time within which they may be filed has expired, or upon an express waiver of the right to file, the motion, petition, and briefs shall be distributed to the court by the clerk.

5. If the petition seeks issuance of an original writ of habeas corpus, it shall comply with the requirements of 28 U. S. C. § 2242, and in particular with the last paragraph thereof; and, if the relief sought is from the judgment of a state court, shall specifically set forth how and wherein the petitioner has exhausted his remedies in the state courts. See *Ex parte Abernathy,* 320 U. S. 219; *Ex parte Hawk,* 321 U. S. 114. Proceedings under this paragraph will be *ex parte,* unless the court requires the respondent to show cause why leave to file the petition for a writ of habeas corpus should not be granted. Neither refusal of leave to file, without more, nor an order of transfer under authority of 28 U. S. C. § 2241 (b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

6. If the court orders the cause set down for argument, the clerk will notify the parties whether additional briefs are required, when they must be filed, how much time has been allotted for oral argument, and, if the case

involves a petition for common law certiorari, that the parties shall proceed to print an appendix pursuant to Rule 36.

32.

CERTIORARI TO CORRECT DIMINUTION OF RECORD ABOLISHED.

The writ of certiorari to correct diminution of the record is abolished. Relief formerly obtained by grant of that writ shall be sought by a motion to require certification of additional portions of the record.

PART VIII. PRACTICE.

33.

SERVICE AND SPECIAL RULE WHERE CONSTITUTIONALITY OF ACT OF CONGRESS IN ISSUE.

1. Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If personal, it shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address. Where the person on whom service is to be made resides 500 miles or more from the person effecting service, such mailing must be made with air mail postage prepaid.

2. (a) If the United States or an officer or agency thereof is a party, service of all briefs, pleadings, notices and papers shall, notwithstanding the foregoing paragraph, be made upon the Solicitor General, Department of Justice, Washington, D. C. 20530. Where an agency of the United States authorized by law to appear in its own behalf is a party in addition to the United States, such agency shall also be served, in addition to the Solicitor General, in every case.

(b) In any proceeding in whatever court arising wherein the constitutionality of any Act of Congress

affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this court shall recite that 28 U. S. C. § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. In proceedings from any court of the United States as defined by 28 U. S. C. § 451, such initial pleading, motion or paper shall state whether or not any such court has, pursuant to 28 U. S. C. § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

3. Whenever proof of service is required by these rules, it must be stated that all parties required to be served have been served and such service may be shown, either by indorsement on the document served or by separate instrument, by any one of the methods set forth below; and it is not necessary that service on each party required to be served be effected in the same manner or evidenced by the same proof:

(a) By an acknowledgment of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, such certificate to be signed by a member of the bar of this court representing the party in behalf of whom such service has been effected. If counsel certifying to such service has not up to that time entered his appearance in this court in respect of the cause in which such service is made, his appearance shall accompany the certificate of service if the same is to be filed in this court.

(c) By an affidavit of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this

rule, whenever such service is effected by any person not a member of the bar of this court.

4. Whenever proof of service is required by these rules, it must accompany or be indorsed upon the document in question at the time such document is presented to the clerk for filing. Any document filed with the clerk or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance.

34.

COMPUTATION AND ENLARGEMENT OF TIME.

1. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. A half holiday shall be considered as other days and not as a holiday.

2. Whenever any justice of this court or the clerk is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper, an application seeking such extension must be presented to the clerk within the period sought to be extended. Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstance if filed during the last ten days of such period.

3. All applications seeking an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper must be presented and served upon all other parties as provided in

Rule 50, but such applications for extension of time, if once denied, may not be renewed before another justice after expiration of the period sought to be extended.

4. Whenever a justice or the clerk has granted an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper it shall be the duty of the party to whom such extension is granted to give all other parties to the proceeding prompt notice thereof.

5. All applications for extensions of time to file briefs, motions, appendices or other papers, to designate parts of records for printing in appendices, or otherwise to comply with time limits provided by these rules, except applications for extensions of time to file petitions for certiorari, to docket appeals, to petition for rehearings or to issue mandates shall in the first instance be acted upon by the clerk, whether addressed to him, to the court or to a justice. Any party aggrieved by the clerk's action on such application may request that it be submitted to a justice or to the court.

35.

MOTIONS.

1. Every motion to the court shall state clearly its object and the facts on which it is based. A brief in support of the motion (other than motions under Rule 31) may be filed therewith.

2. Motions and applications addressed to a single justice need not be printed, and only a typewritten original need be filed. Motions in actions within the court's original jurisdiction shall be printed, and sixty copies shall be filed. Motions to dismiss or affirm made under Rule 16, motions to bring up the entire record under Rule 28 (2), motions for permission to file a brief *amicus curiae*, any motions the granting of which would be dispositive of the entire case or would affect the final judgment to be entered (other than a motion to docket or dismiss under Rule 14, or a motion for voluntary

dismissal under Rule 60), and any motions to the court accompanied by a supporting brief, shall likewise be printed, and forty copies of the motion and of the brief, if any, shall be filed. All other motions to the court need not be printed, and it shall be sufficient to file a typewritten original and nine legible typewritten copies; but the court may by subsequent order require any such motion to be printed by the moving party.

3. Motions to the court shall be filed with the clerk, with proof of service unless *ex parte* in nature. For applications and motions addressed to a single justice, see Rule 50. No motion shall be presented in open court, other than a motion for admission to the bar, except when the proceeding to which it refers is being argued. Oral argument will not be heard on any motion unless the court specially assigns it therefor.

4. Action by the court or a justice on contested motions will ordinarily, but not always, be withheld to permit responses by opposing parties, but such responses shall be made as promptly as possible considering the nature of the relief asked and any asserted need for emergency action, and, in any event, shall be made within ten days unless otherwise ordered by the court or a justice, or by the clerk under the provisions of paragraph 5 of Rule 34. Responses to printed motions shall be printed if time permits.

5. Printed motions must comply with Rule 39 with respect to format, signatures, and index. Typewritten motions must similarly comply with Rule 47.

36.

PRINTING OF APPENDICES.

1. In the absence of a stipulation pursuant to paragraph 4 below, the appellant or petitioner shall, within forty-five days after the order noting or postponing jurisdiction or of the order granting the writ of certiorari, prepare and file forty copies of an appendix to the briefs

which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant pleading, charge, finding or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the court's particular attention. At the same time or promptly thereafter the appellant or petitioner shall file with the clerk a statement of the costs of preparing the appendix. The appellant or petitioner shall serve at least three copies of the appendix and a copy of the statement of costs on each of the other parties to the proceeding.

2. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, not later than ten days after the order noting or postponing jurisdiction or of the order granting the writ of certiorari, the appellant or petitioner shall serve on the appellee or respondent a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If in the judgment of the appellee or respondent the parts of the record designated by the appellant or petitioner are not sufficient, the appellee or respondent shall, within ten days after receipt of the designation, serve upon the appellant or petitioner a designation of additional parts to be included in the appendix. The appellant or petitioner shall include the parts thus designated in the appendix. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

3. Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant or petitioner, but if the appellant or petitioner considers that parts of the record designated by the appellee or respondent for inclusion are unnecessary for the determination of the issues presented he may so

advise the appellee or respondent and the appellee or respondent shall advance the cost of including such parts unless the court or a justice by appropriate order fixes the initial allocation of the expense of printing the appendix. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matter to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

4. If the parties shall so stipulate, or the court shall so order, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed fourteen days after service of the brief of the appellee or respondent, or at least twenty days before the case is set for argument, whichever is later. If the preparation and filing of the appendix is thus deferred, the provisions of paragraphs 1, 2 and 3 of this rule shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

5. If the deferred appendix authorized by paragraph 4 of this rule is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his brief within the time required by Rule 41, with appropriate references to the pages of the parts of the record involved. In that event, within ten days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 39 containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the

parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

6. At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

7. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this paragraph.

8. The court may by order dispense with the requirement of an appendix and may permit cases to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

9. For good cause shown the time limits specified in this rule may be shortened or enlarged by the court, by a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34.

37.

TRANSLATIONS.

Whenever any record transmitted to this court shall contain any document, paper, testimony, or other pro-

ceedings in a foreign language, without a translation of such document, paper, testimony, or other proceedings, made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and, if necessary, printed as a part of the appendix.

38.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the clerk at least one week before the case is heard or submitted.

2. All such models, diagrams, and exhibits of material placed in the custody of the clerk must be taken away by the parties within forty days after the case is decided. When this is not done, it shall be the duty of the clerk to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to him may seem best.

39.

FORM OF APPENDICES, PETITIONS, BRIEFS, ETC.

1. All appendices, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches, except that appendices in patent cases may be printed in such size as is necessary to utilize copies of patent documents. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than 11-point type) adequately leaded; and the paper must be opaque and unglazed. If footnotes are included, they may not be printed in type smaller than 9-point.

2. All printed documents presented to the court, other than appendices, must bear on the cover the name and post office address of the member of the bar of this court who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other counsel and, if desired, their post office addresses, may be added. The body of the document shall at its close bear the printed names of counsel of record and of such other individual counsel as may be desired. One copy of every printed motion filed with the clerk (other than a motion to dismiss or affirm under Rule 16) must in addition bear, at the appropriate place in the body thereof, the manuscript signature of counsel of record.

3. All printed documents presented to the court other than appendices, which in this respect are governed by Rule 36, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of the cases (alphabetically arranged), text books and statutes cited, with references to the pages where they are cited.

4. Printing, as the term is used in these rules, shall include any process capable of producing a clear black image on white paper but shall not include ordinary carbon copies. If papers are filed in a form which is not clearly legible, the clerk will require that new copies be substituted, but the filing shall not thereby be deemed untimely.

40.

BRIEFS—IN GENERAL.

1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if there were such and they have been reported.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(c) The constitutional provisions, treaties, statutes, ordinances and regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(d) (1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

(e) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the appendix, e. g., (A. 12) or to the record, e. g., (R. 12).

(f) In briefs on the merits, or in any briefs wherein the argument portion extends beyond twenty printed pages, a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(g) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

(h) A conclusion, specifying with particularity the relief to which the party believes itself entitled.

2. Whenever, in the brief of any party, a reference is made to the appendix or the record, it must be accompanied by the appropriate page number. When the reference is to a part of the evidence, the page citation must be specific. If the reference is to an exhibit, both the page number at which the exhibit appears and at which it was offered in evidence must be indicated, e. g., (Pl. Ex. 14; R. 199, 2134).

3. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and except that items (a), (b), (c) and (d) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side.

4. Reply briefs shall conform to such portions of this rule as are applicable to the briefs of an appellee or respondent, but need not contain a summary of argument, regardless of their length, if appropriately divided by topical headings.

5. Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the court.

41.

BRIEFS ON THE MERITS—TIME FOR FILING.

1. Counsel for the appellant or petitioner shall file with the clerk forty copies of his printed brief on the

merits, within forty-five days of the order noting or postponing probable jurisdiction or of the order granting the writ of certiorari.

2. Forty printed copies of the brief of the appellee or respondent shall be filed with the clerk within thirty days after the receipt by him of the brief filed by the appellant or petitioner.

3. Reply briefs will be received up to three days before the case is called for hearing; but, since later filing may delay consideration of the case, only by leave of court thereafter.

4. The periods of time stated in paragraphs 1 and 2 of this rule may be enlarged, as provided in Rule 34, upon motion duly made; or, if a case is advanced for hearing, the time for filing briefs may be abridged as circumstances shall require, pursuant to order of the court on its own or a party's motion.

5. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file forty printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or, by leave of court, thereafter.

6. No brief will be received through the clerk or otherwise after a case has been argued or submitted, except upon special leave.

7. No brief will be received by the clerk unless the same shall be accompanied by proof of service as required by Rule 33.

42.

BRIEFS OF AN AMICUS CURIAE.

1. A brief of an *amicus curiae* prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, filed with the consent of the parties, or a

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motion for leave to file when consent is refused, may be filed only if submitted a reasonable time prior to the consideration of the jurisdictional statement or of the petition for writ of certiorari. Such motions are not favored. Distribution to the court under the applicable rules of the jurisdictional statement or of the petition for writ of certiorari, and its consideration thereof, will not be delayed pending the receipt of such brief or the filing of such motion.

2. A brief of an *amicus curiae* in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported.

3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its attorney general; or for a political subdivision of a State, Territory, or Commonwealth sponsored by the authorized law officer thereof.

5. All briefs, motions, and responses filed under this rule shall be printed; shall comply with the applicable

provisions of Rules 35, 39, and 40 (except that it shall be sufficient to set forth the interest of the *amicus curiae*, the argument, the summary of argument if required by Rule 40 (1)(f), and the conclusion); and shall be accompanied by proof of service as required by Rule 33.

43.

CALL AND ORDER OF THE CALENDAR.

1. The clerk shall, at the commencement of each term, prepare a calendar, consisting of the cases that have become or will be available for argument, which shall be arranged in the first instance in the order in which they are ordered set down for argument, and which shall indicate which of them have been ordered heard as summary calendar cases under Rule 44 (3). No separate summary calendar will be maintained. The arrangement of cases on the calendar shall be subject to modification in the light of availability of appendices, extensions of time to file briefs, and of orders granting motions to advance or postpone or specially setting particular cases for argument. Cases will be calendared so that they will not normally be called for argument less than two weeks after the brief of the appellee or respondent has been filed. The clerk shall keep the calendar current throughout the term, adding cases as they are set down for argument, and making rearrangements as required. He shall periodically publish hearing lists in advance of each argument session, for the convenience of counsel and the information of the public.

2. Unless otherwise ordered, the court, on the second Monday of each term, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the term in the same order, except as hereinafter provided.

3. Cases will not be called until they are actually reached for argument. The clerk will seasonably advise counsel when they are required to be present in court.

4. Cases may be advanced or postponed by order of the court, upon motion duly made showing good cause therefor.

5. Two or more cases, involving the same question, may, on the court's own motion or by special permission on the motion or stipulation of the parties, be argued together as one case, or on such terms as may be prescribed.

44.

ORAL ARGUMENT.

1. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. The court looks with disfavor on any oral argument that is read from a prepared text.

2. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-appeals or cross-writs of certiorari they shall be argued together as one case and in the time of one case, and the court will, by order seasonably made, advise the parties which one is to open and close.

3. In cases on the summary calendar, half an hour a side, and no more, will be allowed for the argument, and only one counsel will be heard on each side, except by special permission, which will be granted only upon a showing that parties with differing interests are on the same side. A case will be placed on the summary calendar whenever the court concludes that it is of such a character as not to justify extended argument.

4. In all other cases, one hour on each side, and no more, will be allowed for the argument, unless more time be granted before the argument begins. Any request for additional time shall be presented by letter addressed to the clerk (copy to be sent opposing counsel), and shall set forth with specificity and conciseness why the case cannot be presented within the one hour limitation. Two counsel, and no more, will be heard for each side, except by special permission when there

are several parties on the same side. Divided arguments are not favored by the court. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

5. In any case, and regardless of the number of counsel participating, a fair opening of the case shall be made by the party having the opening and closing.

6. Oral argument will not be heard on behalf of any party for whom no brief has been filed.

7. Counsel for an *amicus curiae* whose brief has been duly filed pursuant to Rule 42 may, with the consent of a party, argue orally on the side of such party, provided that neither the time nor the number of counsel permitted for oral argument on behalf of that party under the preceding paragraphs of this rule will thereby be exceeded. In the absence of such consent, argument by counsel for an *amicus curiae* may be made only by special leave of court, on motion particularly setting forth why such argument is thought to provide assistance to the court not otherwise available. Such motions, unless made on behalf of the United States or of a State, Territory, Commonwealth, or Possession, are not favored.

45.

SUBMISSION ON BRIEFS BY ONE OR BOTH PARTIES WITHOUT ORAL ARGUMENT.

1. The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties.

2. When a case is called and no counsel appear to present argument, but briefs have been filed, the case will be treated as having been submitted.

3. When a case is called, if a brief has been filed for only one of the parties and no counsel appears to present oral argument for either party, the case will be regarded as submitted on that brief.

46.

JOINT OR SEVERAL APPEALS OR PETITIONS FOR WRITS OF CERTIORARI; SUMMONS AND SEVERANCE ABOLISHED.

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition.

47.

FORM OF TYPEWRITTEN PAPERS.

1. All papers specifically permitted by these rules to be presented to the court without being printed shall, subject to Rule 53 (1), be typewritten or otherwise duplicated upon opaque, unglazed paper, 8½ by 13 inches in size (legal cap), and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double-spaced. When more than one original is required by any rule, the copies must be legible.

2. The original copy of all typewritten motions and applications must be signed in manuscript by the party or by counsel, but, in a cause not yet docketed, such counsel need not be a member of the bar of this court.

48.

DEATH, SUBSTITUTION, AND REVIVOR—PUBLIC OFFICERS, SUBSTITUTION AND DESCRIPTION.

1. Whenever either party shall die after filing notice of appeal to this court or filing of petition for writ of certiorari in this court, the proper representative of the deceased may appear and, upon motion, be substituted as a party to the proceeding. If such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for

such an order, if appellee or respondent, shall be entitled to have the appeal or petition for or writ of certiorari dismissed or the judgment vacated for mootness, as may be appropriate; and, if the party so moving be appellant or petitioner, shall be entitled to proceed as in other cases of nonappearance by appellee or respondent. Such substitution, or, in default thereof, such suggestions, must be made within six months after the death of the party, else the case shall abate.

2. Whenever, in the case of a suggestion made as provided in paragraph 1 of this rule, the case cannot be revived in the court whose judgment is sought to be reviewed because the deceased party has no proper representative within the jurisdiction of that court, but does have a proper representative elsewhere, proceedings shall then be had as this court may direct.

3. When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

4. When a public officer is a party in a proceeding here in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

49.

CUSTODY OF PRISONERS IN HABEAS CORPUS PROCEEDINGS.

1. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a per-

son having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

2. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to this court, or to a judge or justice of either court.

3. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or this court, or a judge or justice of either court, shall otherwise order.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall govern review in the court of appeals and in this court unless for special reasons shown to the court of appeals or to this court, or to a judge or justice of either court, the order shall be modified or an independent order respecting custody, enlargement or surety shall be made.

50.

APPLICATIONS TO INDIVIDUAL JUSTICES; PRACTICE IN CHAMBERS.

1. All motions and applications addressed to individual justices shall normally be submitted to the clerk, who will promptly transmit them to the justice concerned. If oral argument on the application is desired, request therefor shall accompany the application.

2. All motions and applications addressed to individual justices shall be accompanied by proof of service on all other parties. In urgent cases, proof of telegraphic dispatch to such parties of notice that the motion, application, or request is being made will suffice.

3. The clerk will in due course advise all counsel concerned, by means as speedy as may be appropriate, of the time and place of the hearing, if any, or, if no hearing is requested or granted, of the disposition made of the motion or application.

4. During the term, applications will be addressed to the justice duly allotted to the circuit within which the case arises. The court or the chief justice will seasonably instruct the clerk as to the distribution of applications during vacation, and whenever a circuit justice is temporarily absent or disabled.

5. A justice denying an application made to him will note his denial thereon. Thereafter, unless action on such application is by law restricted to the circuit justice, or is out of time under Rule 34 (3), the party making the application may renew the same to any other justice, subject to the provisions of this rule. Except where the denial has been without prejudice, such renewed applications are not favored.

6. Any justice to whom an application for a stay or for bail is submitted may refer the same to the court for determination.

51.

STAYS.

1. Stays may be granted by a justice of this court as permitted by law; and writs of injunction may be granted by any justice in cases where they might be granted by the court. For supersedeas on appeal, see Rule 18; for stay pending review on certiorari, see Rule 27.

2. All applications for stays or injunctions made pursuant to this or any other rule must show whether

application for the relief sought has first been made to the appropriate court or courts below, or to a judge or judges thereof, and shall be submitted as provided in Rule 50. See Rules 18 (2) and 27.

3. If an application for a stay addressed to the court is received in vacation, the clerk will refer it pursuant to Rule 50 (4).

52.

FEES.

In pursuance of 28 U. S. C. § 1911, the fees to be charged by the clerk of this court are fixed as follows:

(a) For docketing a case on appeal (except a motion to docket and dismiss under Rule 14 (3), wherein the fee is $25.00) or on petition for writ of certiorari or docketing any other proceeding, $100.00, to be increased to $150.00 in a case on appeal or writ of certiorari when oral argument is permitted.

(b) For making a copy (except a photographic reproduction) of any record or paper, and comparison thereof, 40 cents per page of 250 words or fraction thereof; for comparing for certification a copy (except a photographic reproduction) of any record or paper when such copy is furnished by the person requesting its certification, 10 cents for each page of 250 words or fraction thereof.

For a photographic reproduction and certification of any record or paper, 50 cents per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, 5 cents for each page, and 50 cents for each certificate.

(c) For a certificate and seal, $3.00.

(d) For an admission to the Bar and certificate under seal, $25.00.

(e) For a duplicate certificate of an admission to the Bar under seal, $10.00.

PART IX. SPECIAL PROCEEDINGS.

53.

PROCEEDINGS IN FORMA PAUPERIS.

1. A party desiring to proceed in this court *in forma pauperis* shall file a motion for leave so to proceed, together with his affidavit setting forth facts showing that he comes within the statutory requirements. See 28 U. S. C. § 1915; *Adkins* v. *DuPont Co.*, 335 U. S. 331. One copy of each will suffice. Papers in cases presented under this rule should, whenever possible, comply with Rule 47.

2. With the motion and affidavit there shall be filed the appropriate substantive document—statement as to jurisdiction, petition for writ of certiorari, or motion for leave to file, as the case may be—which shall comply in all respects with the rules governing the same, except that it shall be sufficient to file a single copy thereof. Notwithstanding any other provision of these rules, a party moving for leave to proceed *in forma pauperis* who shows that he was unable to obtain a certified copy of the record in the court below without payment of fees and costs need not file such a record with his jurisdictional statement, petition for writ of certiorari, or motion for leave to file.

3. When the papers required by paragraphs 1 and 2 of this rule are presented to the clerk, accompanied by proof of service as prescribed by Rule 33, he will, without payment of any docket or other fees, file them, and place the case on the miscellaneous docket.

4. The appellee or respondent in a case *in forma pauperis* may respond in the same manner and within the same time as in any other case of the same nature, except that the filing of a single response, typewritten or otherwise duplicated, with proof of service as required

by Rule 33, will suffice whenever petitioner or appellant has filed unprinted papers.

5. While making due allowance for cases presented under this rule by persons appearing *pro se*, the clerk will refuse to receive any motion for leave to proceed *in forma pauperis* when it and the papers submitted therewith do not comply with the substance of this court's rules, or when it appears that the accompanying papers are obviously out of time.

6. If, in a case presented under this rule, the court enters an order noting or postponing probable jurisdiction, or granting a writ of certiorari, and the case is set down for argument, it will be transferred to the appellate docket, and the court will make such order respecting the furnishing of a record and the printing of an appendix as may be appropriate. The court may, in any case presented under this rule, require the furnishing of the record prior to its consideration of the motion papers.

7. Whenever the court appoints a member of the bar to serve as counsel for an indigent party, the briefs prepared by such counsel will, unless he requests otherwise, be printed under the supervision of the clerk; and the clerk will in any event reimburse such counsel for necessary travel expenses including first-class transportation from his home to Washington, D. C., and return in connection with the argument of the cause.

8. In any case arising on direct review of a judgment in a criminal case originating in a federal court where this court has granted certiorari or noted or postponed jurisdiction and where the defendant in the original proceeding is financially unable to obtain adequate representation or to meet the necessary expenses in this court, the court will appoint counsel who may be compensated, and whose necessary expenses may be repaid, to the extent provided by the Criminal Justice Act of 1964 (78 Stat. 552; 18 U. S. C. § 3006A).

54.

VETERANS' AND SEAMEN'S CASES.

1. A veteran suing to establish reemployment rights under the provisions of Section 9 (d) of the Universal Military Training and Service Act, as amended (50 U. S. C. App. § 459 (d)), or under similar provisions of law exempting veterans from the payment of fees or court costs, may proceed upon typewritten papers as under Rule 53, except that the motion shall ask leave to proceed as a veteran, the affidavit shall set forth the moving party's status as a veteran, and the case will be placed on the docket that would have been appropriate for its disposition had it been presented on printed papers.

2. A seaman suing pursuant to 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but he is not relieved of printing costs nor entitled to proceed on typewritten papers except by separate motion, or unless, by motion and affidavit, he brings himself within Rule 53.

PART X. DISPOSITION OF CAUSES.

55.

OPINIONS OF THE COURT.

1. All opinions of the court shall be handed to the clerk immediately upon the delivery thereof. He shall cause the same to be printed and shall deliver a copy to the reporter of decisions.

2. The original opinions shall be filed by the clerk for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term he shall cause them to be bound in a substantial manner, and when so bound they shall be deemed to have been recorded.

56.

INTEREST AND DAMAGES.

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the entry of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

3. In cases in admiralty, damages and interest may be allowed only if specially directed by the court.

4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay.

57.

COSTS.

1. In all cases of affirmance of any judgment or decree by this court, costs shall be paid by appellant or petitioner unless otherwise ordered by the court.

2. In cases of reversal or vacating of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

3. The cost of printing the appendix in this court is a taxable item. The cost of printing briefs, motions, petitions, and jurisdictional statements is not a taxable item.

4. In cases where questions have been certified, including such cases where the certificate is dismissed, costs

shall be equally divided unless otherwise ordered by the court; but where the entire record has been sent up (Rule 28, par. 2), and a decision is rendered on the whole matter in controversy, costs shall be allowed as provided in paragraphs 1 and 2 of this rule.

5. In all actions commenced prior to July 18, 1966, no costs shall be allowed in this court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court. In all other actions, costs as provided in this rule shall be allowed for or against the United States or an officer or agent thereof (unless expressly waived or otherwise ordered by the court) except that no such costs shall be allowed in criminal cases.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the clerk any bill of costs.

7. In appropriate instances, the court may adjudge double costs.

58.

REHEARINGS.

1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; it must be printed in conformity with Rule 39; and forty copies, one of which shall bear the manuscript signature of counsel to the certificate, must be filed, accompanied by proof of service as prescribed by

Rule 33. A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

2. A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk in term time or vacation, subject to the requirements respecting time, printing, number of copies furnished, manuscript signature to certificate, and service, as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 34, footnote 1; *Massey* v. *United States,* 291 U. S. 608), or to other substantial grounds available to petitioner although not previously presented (e. g., *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

3. No reply to a petition for rehearing will be received unless requested by the court. No petition for rehearing will be granted in the absence of such a request and an opportunity to submit a reply in response thereto.

4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received.

59.

PROCESS; MANDATES.

1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. Subject to paragraph 3 of this rule, mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, unless the time is shortened or enlarged by an order of the court or of a justice thereof, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing will, unless otherwise ordered, stay the mandate until disposition of such petition, and if the petition is then denied, the mandate shall issue forthwith. When, however, a petition for rehearing is not acted upon prior to adjournment or is filed after the court adjourns, the judgment or mandate of the court will not be stayed unless specifically so ordered by the court or a justice thereof.

3. In cases coming from federal courts, a formal mandate shall not issue unless specially directed. In the absence of such direction, it shall suffice for the clerk to send to the proper court, within the time and under the conditions set out in paragraph 2 of this rule, a copy of the opinion or order of this court, and a certified copy of the judgment of this court, which in cases under this paragraph shall include provisions for the recovery of costs if any are awarded.

60.

DISMISSING CAUSES.

1. Whenever the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for or extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk shall, without further reference to the court, enter an order of dismissal.

2. Whenever an appellant or petitioner in this court shall, by his attorney of record, file with the clerk a motion to dismiss a proceeding to which he is a party, with proof of service as prescribed by Rule 33, and shall

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tender to the clerk any fees and costs that may be due, the adverse party may within fifteen days after service thereof file an objection, limited to the quantum of damages and costs in this court alleged to be payable, or, in a proper case, to a showing that the moving party does not represent all appellants or petitioners if there are more than one. The clerk will refuse to receive any objection not so limited.

3. Where the objection goes to the standing of the moving party to represent the entire side, the party moving for dismissal may within ten days thereafter file a reply, after which time the matter shall be laid before the court for its determination.

4. If no objection is filed, or if upon objection going only to the quantum of damages and costs in this court, the party moving for dismissal shall within ten days thereafter tender the whole of such additional damages and costs demanded, the clerk shall, without further reference to the court, enter an order of dismissal. If, after objection as to quantum of damages and costs in this court, the moving party does not respond with such a tender, then the clerk shall report the matter to the court for its determination.

5. No mandate or other process shall issue on a dismissal under this rule without an order of the court.

PART XI. APPLICATION OF TERMS.

61.

TERM "STATE COURT" INCLUDES SUPREME COURT OF PUERTO RICO.

The term "state court" when used in these rules includes the Supreme Court of the Commonwealth of Puerto Rico, and references in these rules to the law and statutes of a state include the law and statutes of the Commonwealth of Puerto Rico.

PART XII. EFFECTIVE DATE.

62.

EFFECTIVE DATE OF AMENDED RULES.

The amended rules adopted on June 12, 1967, shall become effective on October 2, 1967, except that with respect to cases granted review prior to that date, the time limits for briefs and the provisions regarding the printing of records shall continue to be governed by the rules as they were before amendment.

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	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1964	1965	1966	1964	1965	1966	1964	1965	1966	1964	1965	1966
Number of cases on dockets	11	17	13	1,247	1,436	1,469	1,404	1,831	1,874	2,662	3,284	3,356
Number disposed of during terms	2	9	5	1,027	1,182	1,232	1,151	1,502	1,666	2,180	2,693	2,903
Number remaining on dockets	9	8	8	220	254	237	253	329	208	482	591	453

	TERMS		
	1964	1965	1966
Distribution of cases disposed of during terms:			
Original cases	2	9	5
Appellate cases on merits	236	282	310
Petitions for certiorari	791	900	922
Miscellaneous docket applications	1,151	1,502	1,666

	TERMS		
	1964	1965	1966
Distribution of cases remaining on dockets:			
Original cases	9	8	8
Appellate cases awaiting argument	86	91	68
Appellate cases pending	134	163	169
Miscellaneous docket applications	253	329	208

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2. *Sherman Act—Territorial allocations—Stockholder-licensees.*—The territorial allocations here are not vertical arrangements imposed by the licensor but horizontal restraints arranged by appellee's stockholder-licensees, who are themselves directly in charge of appellee's operations. The territorial restraints were part of the unlawful price-fixing and policing activities of appellee acting as an instrumentality of the licensees and constituted "an aggregration of trade restraints" which was illegal *per se*. United States v. Sealy, Inc., p. 350.

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2. *Unfair labor practice—Employer's discriminatory conduct—Business justifications.*—If it can reasonably be concluded that the

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3. *Union membership—Crossing picket lines—Collection of fines.*—The history of legislative action surrounding § 8 (b) (1) (A)'s prohibition of union activity to "restrain or coerce" employees in the exercise of rights guaranteed by § 7 justifies the conclusion, in light of the imprecision of the words "restrain or coerce," and the repeated refrain that Congress did not propose limitations on the internal affairs of unions, that Congress did not intend to prohibit the imposition of reasonable fines on full union members who declined to honor an authorized strike or to prohibit attempts to collect such fines. NLRB v. Allis-Chalmers Mfg. Co., p. 175.

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UNIVERSITY OF ALABAMA. See **Libel.**

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WITNESSES. See also **Constitutional Law,** IV, 1–2; V, 1–2, 4; **Procedure,** 1–2.

Testimony of accomplice — Texas' statutory exclusion — Sixth Amendment.—Texas statutes which prevented a participant accused of a crime from testifying for his coparticipant (but not for the prosecution) arbitrarily denied petitioner the right to have material testimony for him and thus denied him the right to have compulsory process for obtaining witnesses in his favor. Washington v. Texas, p. 14.

WORDS.

"Restrain or coerce."—§ 8 (b)(1), National Labor Relations Act, 29 U. S. C. § 158 (b)(1). NLRB v. Allis-Chalmers Mfg. Co., p. 175.

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